Is a vessel actually going astern at the time of collision liable for such collision merely because she failed to stop her engines until six minutes before the same, while the vessels were still about two miles apart?

No. 2365

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian Steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, Claimant of the American Steamship "Beaver",

Appellee.

BRIEF FOR APPELLANT.

E. B. McCLANAHAN,
S. H. DERBY,
Proctors for Appellant.

Filed this.....day of February, 1914.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLANT.

This is an appeal from a decree of the District Court of the Northern District of California. The original libel was brought by Olaf Lie, Master of the Norwegian steamship "Selja", on behalf of himself and the owners, officers and crew of the "Selja", which was sunk in a collision with the steamship "Beaver" on November 22, 1910, near Point Reyes on the coast of California. An intervening libel was also filed by Captain Lie on behalf of the cargo of the "Selja", and a separate suit was

brought by the charterers of the "Selja" to recover their chartered freight. The three cases were consolidated for trial and referred to a Commissioner to take the evidence. After a lengthy hearing before the Commissioner the case was argued before the court and both vessels were held in fault. The cargo interest and later the freight interest were allowed a full recovery, and the libelant was also allowed a full recovery on behalf of the officers and crew of the "Selja" (no appeal being taken by either side from this part of the decree).

The interlocutory decree provided that the damages of the libelant individually and of the owner of the "Selja" should be apportioned with the damages suffered by the "Beaver" under the usual rule as to cross liabilities, and that libelant should recover the balance found due after such apportionment (IV, 1401-2).* It also provided, following the rule of *The Chattahoochee,* 173 U. S. 540, that from these half damages should be deducted one-half of the damages suffered by the cargo and other interests (Id.). All the damages were later agreed to by stipulation. The cargo damages amounted to over $260,000 (IV, 1404-6), while the damages suffered by Captain Lie and the owner of the "Selja" aggregated $180,878.69 (IV, 1410, 1434-5). These damages are set out in full in the final decree (IV, 1434-5), and it is also adjudged that they should bear interest at 6% per annum from the date of the collision. As half of the cargo damages alone were considerably more than the

* Note:—Roman numerals indicate volume of Apostles on Appeal and numbers indicate the pages thereof.

half damages awarded to the libelant, the result was that the master and owner of the "Selja" recovered *nothing at all,* and the final decree so provides (IV, 1435). The appeal is taken from this portion of the decree and also from the further provision that the costs be divided. If the lower court was correct in holding both vessels in fault, the decree is also correct. If, however, the "Selja" was not in fault, or if its fault is held not to have contributed to the collision, the libelant should have an award for the full damages suffered, with interest as aforesaid and also his costs.

Statement of Facts.

As to the "Selja":

On November 22, 1910, at about the hour of 3:16 P. M., off Point Reyes in a dense fog, the Norwegian steamship "Selja" was run into and sunk by the American steamer "Beaver". Providentially, but two lives were lost.

The "Selja", in command of Captain Olaf Lie, was a modern tramp steamer 380 feet long with a displacement fully loaded of 10,275 tons on a mean draft of 23 feet 6 inches (Lie, I, 151). She left Yokohama, Japan, on the 2nd day of November, 1910, bound for San Francisco (Id. 150). The last observation taken by her master while on the Great Circle course was at 10:10 P. M. on November 21st, and showed the steamer to be 98 miles from Point Reyes (Id. 152). At 11 P. M. of that night her course was changed to S. 70° E. Magnetic, and she continued on this course until 8 A. M. November

22nd (Id.). At 1 A. M. of the same night the "Selja" encountered fog, though otherwise the weather was fine and the sea was calm with a long, rolling swell (Id. 153). This condition of sea and weather continued up to the time of the collision. When the "Selja" entered the fog at 1 A. M., November 22nd, the third officer then on watch called the master to the bridge, where he remained practically continuously, directing the ship's navigation, until the collision. From 1 A. M. the "Selja's" whistle was continuously blown at intervals of about a minute (Id. 153). At about 2 A. M. three blasts from the fog horn of a sailing vessel were heard about three points on the "Selja's" starboard bow, and, as the light wind then blowing was westerly, this signal told the master of the "Selja" that the sailing ship was practically on his course with the wind abaft her beam. Under these circumstances, the "Selja" proceeded on her course and, after hearing four or five further blasts from the ship's fog horn, she was passed by the "Selja" astern on her starboard side (Id. 153-4). At about 2:45 A. M. a steamer's whistle was heard by Captain Lie from an unascertained direction and the "Selja's" engine was immediately stopped (Id. 154). A second whistle was then heard and located at about five points on the port bow, and the "Selja" proceeded on her course (Id.). After passing this steamer and up to 5:30 A. M. the "Selja" proceeded at full speed, or about 10 knots, with 64 revolutions of her engine (Id. 152, 154-5). At 8 A. M. the ship's course was changed from S. 70° E. Magnetic to West Magnetic (Id. 155), and her speed was reduced to dead slow (Id. 156). This dead slow speed was maintained throughout the subsequent

courses of the "Selja" up to and until 1 P. M. (Id. 156). She kept her West Magnetic course until 9:30 A. M., when she turned about and steamed east by north until 11 A. M., when she turned about and steamed due west again, maintaining this course until 1 o'clock, when she again turned about and proceeded S. 60° E. Magnetic at half speed, which speed was maintained until 3:05 P. M. (Id. 156), some eleven minutes before the collision. At 5:30 A. M. Captain Lie had commenced to take soundings and continued to do so up to the time of the collision. On his easterly courses, up to 1 P. M., these soundings were taken every half-hour, and on the two westerly courses but twice. After 1 P. M. soundings were taken every five minutes (Id. 155).

Because the "Selja's" general easterly course was on two occasions,—once at 8 A. M. and again at 11 A. M., changed to due west,—in short, because the "Selja" was put about twice that morning, counsel in the lower court contended that Captain Lie "was virtually lost in the fog". As the fog throughout the forenoon of November 22nd was heavier than in the afternoon—in the forenoon it was "very dense" and objects were only visible some two or three hundred feet (Id. 155), the proper inference (if it be important to draw any because of the changes in the "Selja's" course) is that Captain Lie was killing time and cautiously loitering at dead slow speed in the hope of seeing the fog lift, and this inference is borne out by the ship's log (IV, 1453). And when, at 1 o'clock, he finally did put his engine from dead slow to half speed, and took his S. 60° E. course, he did it deliberately because the fog had become less dense (Id.)

and for the purpose of making Point Reyes. Third Officer Bjorn expressly says as to this last change: "We was going to get Point Reyes, make Point Reyes" (Bjorn, I, 110). While on her course of S. 60° E. Magnetic, at 2:30 P. M., the Point Reyes fog siren, which all hands had been waiting for, sounded loud and clear between three and four points on the "Selja's" port bow (Lie, I, 157). At 2:50 P. M. the "Selja's" S. 60° E. course was changed to S. 65° E. for the lightship off the entrance to San Francisco harbor, and this latter course was not changed up to the time of the collision (Id. 160).

After the first officer had taken the compass bearing of the Point Reyes siren at 3 o'clock, Captain Lie was on the point of going into his chart room to lay the data off, when a deep, faint, but distinct far-off whistle was heard bearing about right ahead (Id. 160-2). The weather at the time was calm with a long, rolling westerly swell and a low fog through which the sun was shining, making objects visible at a distance of about two ship lengths (Id. 162). The Point Reyes siren, known at the time to be over a mile and a half distant, was and had been blowing every thirty-five seconds, and sounded much louder than the whistle heard ahead (Id.). On hearing this first whistle, *because it sounded so far away,* Captain Lie said: "It just came into my mind that it might be one of the fog horns off Golden Gate" (Id. 162).

This was not, we submit, as unnatural a supposition as it might appear, nor does Captain Lie's transitory thought warrant the emphasis which was given it by

counsel in the lower court. Under all the circumstances this deep, faint, far-away whistle, coming from the general direction of the Golden Gate, might, with perfect propriety, have been momentarily taken for one of the fixed whistles at the entrance to the harbor. Hearing the whistle for the second or third time, it was then timed, and by this means found definitely to be an approaching vessel (Id. 163-4). In the meantime, at 3:05 P. M., the engine of the "Selja" had been put at slow speed, because her previous half speed was not considered moderate enough under the circumstances (Id. 164). At 3:10 P. M. the "Selja's" engine was stopped (Hansen, I, 68; Bjorn, I, 115; Anderson, I, 93; Eggen; I, 68; Halvorsen, I, 52; Lie, I, 172), the vessel at the time making about 3 knots (Lie, I, 172), and at 3:15 the "Beaver" loomed in sight at a distance of about nine hundred feet and coming towards the "Selja" at a high rate of speed (Id. 172, 175). When, at about two points on the "Selja's" port bow (Id. 173), the "Beaver" was first seen, the "Selja" had swung three-quarters of a point or a point from her S. 60° E. course because of having commenced to lose headway under her stopped engine (Id.). Captain Lie *saw the escaping steam* from the "Beaver's" whistle, indicating that she was blowing three whistles, and ordered the "Selja's" whistle blown three times and at the same time put her engine full speed astern (Id. 174-5). The collision occurred about a minute afterwards (Id. 179), *while the "Selja" was moving astern* (Lie, I, 176; Halvorsen, I, 54; Bjorn, I, 118; Kidston, III, 907-8), the "Beaver" striking her six or eight feet abaft the bulkhead between No. 1 and No.

2 holds on the port side (Lie, I, 176) at an angle of between seventy and eighty degrees (Id. 175). The marks on the "Beaver" showed that her bow had penetrated the "Selja" through her plates and cargo for 18 feet on the port side and 10 feet on the starboard side (Stewart, I, 138-9). When the "Beaver" backed out from the hole she swung nearly parallel to the "Selja", bow to bow, a little more than a ship's length distant (Lie, I, 179), and in about fifteen minutes the latter sank (Id.). Two of the "Selja's" crew were lost. At the time of the collision, according to Captain Lie, Point Reyes bore north northwest 2½ miles from the "Selja" (Id. 180). The "Beaver's" fog whistle was heard continuously from a minute or two after 3 o'clock (Id. 161) until 3:15 P. M., and the Point Reyes siren was heard continuously from 2:30 until the collision (Id. 180).

The foregoing are the salient facts with reference to the Norwegian ship.

As for the "Beaver":

She is a modern passenger steamer running between this port and Portland, Oregon, 364 feet long with a displacement fully loaded of 5,950 tons on a mean draft of 19 feet 6 inches (IV, 1469), and was in command of Captain William Kidston. She left Pier 40 in the harbor of San Francisco at 12:50 P. M. on the day of the collision, bound on one of her regular trips to Portland, *fifty minutes late* (Kidston, III, 852). In her course out through the Golden Gate she passed the North Heads at 1:37 P. M. and, proceeding through the North Channel, passed Red Buoy No. 2 at 1:45 P. M. (Ettershank, II, 524, 533). In the North Channel she did not blow her

fog whistle because it was only a little hazy (Kidston, III, 853). After passing Red Buoy No. 2, the next point of departure was Duxbury Reef Buoy, which was passed at approximately 2:15 P. M. (Ettershank, II, 532), for, though it was not seen, Captain Kidston said he heard the whistle on the buoy and he judged he passed it about one-half mile off (Kidston, III, 829). At this time, Captain Kidston says, one could possibly see one-half mile, and the fog did not shut down thick until 3 o'clock (Id. 854). On leaving Duxbury Reef the "Beaver" headed into a heavy westerly swell on her regular course N. 86° W. for Point Reyes, which would be her next point of departure (Id. 796, 820). From the time of passing through North Channel, she proceeded at full speed with her engines making 77 revolutions, until at 3 o'clock Captain Kidston sent a written order to the engine room to reduce the revolutions to 76 (Id. 860-1). After passing the whistling buoy at Duxbury Reef several steamer whistles were heard forward of the "Beaver's" beam, but her master judged they were too far away to make it necessary to stop his ship's engines or reduce her speed (Kidston, III, 855-858, 885-887; Ettershank, II, 539-541). At about 3:13 P. M. Ettershank, the "Beaver's" second officer, then navigating the ship, heard the "Selja's" whistle for the first time (Ettershank, II, 505; Kidston, III, 900). Captain Kidston was not then on the bridge, but the whistle was reported to him immediately as being a point on the starboard bow (Id. 799). Going to the bridge he ordered his ship's helm put to starboard and, after she had swung one-half point to port, a second whistle was heard which, to Captain Kidston, still seemed to be a point on the starboard bow

(Id. 799-780). He thereupon stopped and reversed his engine full speed astern and ordered the wheel hard-a-port (Id. IV, 1480), after which the "Selja" loomed in sight, lying, as believed by the "Beaver's" officers, in the trough of the sea a little on the starboard bow (Id. 801). Captain Kidston admits that the "Beaver" struck the "Selja" when the latter was moving astern (Id. 907).

We have stated the facts thus fully because of the great importance of this case from a financial standpoint and the consequent necessity of a full discussion. *The basic fact of the case, however, is that the "Selja" had been able to stop her speed and was moving astern at the time of the collision.* We believe that this fact alone absolves the "Selja" from liability for prior faults, if any, and is decisive of the case.

Analysis of the Decision of the District Court (IV, 1392-1398).

None of the witnesses in this case were examined before the lower court and its decision was based on admitted facts and the law applicable thereto. It is, therefore, evident that no presumptions unfavorable to appellant can be drawn from the decision.

The court does not state the facts as admitted by the "Selja" with entire correctness, especially in failing to state that the "Selja" was moving astern at the time of the collision, and also in stating that the "Beaver" stopped her engines immediately on hearing the "Selja's" first whistle, but this part of the decision is

not important. The court held that the "Selja" was in fault under the latter part of Article 16 of the International Rules for not stopping on hearing the "Beaver's" first whistle, and repeatedly violated the same rule for the succeeding ten minutes; that she was apparently being navigated under former Article 18 of the rules, which simply called for the exercise of good judgment as to stopping, and that said rule had been superseded by Article 16 of the new rules, which imposed a positive duty to stop at the first whistle; that the zone of danger of collision is reached when the first whistle is heard and that the master can exercise no judgment in the matter but must stop at once.

The court also held that this fault of the "Selja" was a contributing cause to the collision, the law being that where a vessel has committed a positive breach of a statutory duty, "she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so", and that the "Selja" had not sustained this burden because "*if she had observed the rule she would not have reached the point of collision at the time she did and the 'Beaver' would have passed her.*"

The court further held that both vessels were equally at fault and that there was no room for the application of the major and minor fault doctrine.

We believe that the foregoing fairly covers the decision. We shall have more to say later of it and the authorities citied in its support, but at present we simply desire to outline to the court the decision itself.

The Assignment of Errors.

This assignment is very short and we, therefore, insert the same in full:

1. That the court erred in holding, deciding and decreeing herein that libelant recover no damages either for himself individually or for the owner of the Norwegian steamship "Selja", and in not awarding to libelant the full damages suffered by himself and said owner as set forth in the final decree herein.

2. That the court erred in holding, deciding and decreeing that the damages of the owner of the "Selja" and the libelant as her master should be apportioned under the usual rule of cross liabilities and subject to the offsets specified in clause 6 of the interlocutory decree herein, and in not awarding said damages in full without offset.

3. That the court erred in allowing any offsets under clause 6 of the interlocutory decree herein.

4. That the court erred in holding and deciding that the said steamship "Selja" was in any way at fault in the collision with the steamship "Beaver", which was the subject of this action.

5. That the court erred in holding and deciding that the said "Selja" violated the second paragraph of Rule 16 regulating the navigation of vessels at sea (26 St. at L. 326).

6. That the court erred in holding and deciding that the violation by the "Selja" of said Rule 16 was a contributing cause to the collision herein.

7. That the court erred in holding and deciding that where a vessel has committed a positive breach of a statutory duty she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so.

8. That the court erred in not holding and deciding that where a vessel is so navigated as to enable her to come to a stop before collision with another vessel, after sighting such other vessel, her prior violation of said Rule 16 is not a contributing cause of the collision, and in not applying said rule to the case at bar.

9. That the court erred in holding that said "Selja" and said "Beaver" were equally at fault, and in not applying the major and minor fault doctrine and holding the "Beaver" solely liable for the collision.

10. That the court erred in not making and entering its final decree herein allowing libelant all damages suffered by himself and the owner of said "Selja", with interest and costs.

11. That the court erred in dividing the costs herein and not allowing libelant his costs herein.

Contentions of Appellant.

The assignment of errors is naturally an attack on the decision and decree of the District Court. The decision, however, does not touch on all the points in the case and it will be necessary to lay before this court certain features not so covered.

We shall first take up the faults committed by the "Beaver" and endeavor to show that she was not only

guilty of the fault admitted by her, to wit: excessive speed, but that she also violated the second part of Article 16 of the International Rules, and that she further violated in several respects the general prudential requirements of Article 29. We shall also endeavor to show that all of these faults were gross, with a view to later applying the major and minor fault doctrine, in case the court shall find it necessary to go into that subject.

Having laid the faults committed by the "Beaver" clearly before the court, we shall take up the two main charges of fault made against the "Selja" in the lower court. We shall first discuss the question whether the "Selja" came to a standstill before sighting the "Beaver" and violated the requirement of Article 15 by not blowing two whistles to apprise the "Beaver" of that fact. We shall then endeavor to show that the "Selja" did not violate the latter part of Article 16 as found by the lower court, in that said article had not become applicable at the time the first whistles of the "Beaver" were heard.

Having thus discussed the faults of the "Selja", we shall proceed to what is, in our opinion, the main point in the case, namely: whether, in view of the fact that the "Selja" had been able to come to a standstill before the "Beaver" reached her, and was actually *moving astern at the time of the collision,* the fault of the "Selja" in not stopping her engines until 3:10 P. M. can be held to be a fault contributing to the collision. In this connection we shall call attention to the major and minor fault doctrine and apply it to this case, and we shall further attempt to show that the decision of this court

in the case of *The Belgian King*, 125 Fed. 869, is conclusive of this litigation.

Thereafter we shall try to point out clearly that the decision of the District Court is erroneous and not supported by the authorities cited therein, after which we shall conclude the brief with a short contrasting statement as to the navigation and general discipline maintained on the respective vessels prior to and at the time of the collision.

I.

The "Beaver's" Gross Violation of the Rule Requiring Moderate Speed in a Fog.

That this question of the "Beaver's" violation of the *moderate speed* rule should have been the one to which was directed more testimony than to any other issue in the case is made significant when it appears that at the oral argument in the lower court, counsel, evidently impressed with the futility of the effort that had been made, admitted the violation of the rule. Had this admission been candidly made in the pleadings, much of the large record in the case would have been saved. If, when made, it was in the hope of *diverting* attention from the *flagrancy* of the fault, counsel is doomed to disappointment, for, after appellant has gone to so much effort and trouble to establish such fault, it will not now be sidetracked by counsel's confession from pointing out to the court the gross, almost criminal, recklessness of the "Beaver" in her violation of the moderate speed rule.

At the same time, however, it should also be noted that it makes little difference in this case, in view of appellee's confession of fault, whether the "Beaver" ran at a speed of 15 knots, as we contend, or at a speed of about 12 knots, as appellee contends. If the point of collision is where our evidence places it, the former result follows, while, if it was where Captain Kidston locates it, we reach the latter result. We enter upon a brief discussion of this subject (1) in order to show the gross character of the "Beaver's" fault, and (2) to explain to the court the purport of much of the evidence, which might otherwise be misunderstood and so that the court may read the record understandingly. Counsel will doubtless attack our conclusions both as to the speed of the "Beaver" and the point of collision, but it will be helpful if, in so doing, he will also clearly point out *how the result of the case can be changed, whichever conclusion is adopted.* Unless he can do this, his discussion will be of very minor importance.

As has been intimated, to no single point in this case was so much testimony directed as there was to a determination of the "Beaver's" speed. The libel in the original suit charged that she was making *11 knots or more* at the time she was sighted by the "Selja's" officers one minute before the collision. The *answer* of the claimant *denies* this, but fails to state what the vessel's speed was. However, in answering the fifth interrogatory propounded in the libel in the *freight suit,* the claimant in the original suit says that her speed at 3 o'clock was *11 knots* with 77 revolutions and a slip of 25 per cent (IV, 1469). In Captain Kidston's sworn

report made to the United States Local Inspectors of Hulls and Boilers, three days after the collision, no mention is made of the "Beaver's" speed, though he said that at 3 o'clock he sent written instructions to the chief engineer "*To slow the engine to 76 turns per min.*" (IV, 1479-80). (These instructions, however, did not reach the chief engineer until 3:10 P. M. while he was in his stateroom) (Paul, II, 628, 633). At the hearing before the Inspectors on November 25th, Captain Kidston, answering a direct question as to his ship's speed, said: "*I ascertained after—11 knots*—76 turns", and that her full speed was 17 knots (Kidston, III, 877). Later on in his examination at this hearing he said he was running full speed through the North Channel, but that when he left the North Channel he was running *11 knots* (Id. 878).

Robert S. Paul, the "Beaver's" chief engineer, at the hearing before the Inspectors said that the best speed the ship had ever made was 16 knots (Paul, II, 639), but that on the day of the collision he slowed her to *13 knots* (Id.) and that she was not making more than 13 knots at any time on that day.

Joseph Ettershank, the "Beaver's" second officer, and her navigating officer just before the collision, testified at this hearing that the ship's speed by the log was "*Around 12 or 12½ approximately*". At the hearing before the Commissioner he testified that at the time the "Beaver's" engines were reversed, a minute before the collision, she was making *13 knots, which was a reduction from the speed she had been making before that* (Ettershank, II, 520); that she was supposed to be

going at full speed before that, and that Captain Kidston had told him that the speed had been reduced to 76 revolutions of the engine (Id. 522-3). This witness also testified that between 1:45 P. M. and 2:15 P. M. the "Beaver" was making around 15 knots (Id. 531); that in the eight minutes elapsing from 1:37 P. M. to 1:45 P. M., when the vessel was passing from the North Heads to Red Buoy No. 2, a distance of two miles, *she made 15 knots* (Id. 534).

Chief Engineer Paul testified in this case that the "Beaver" was making *about 15 knots* through the North Channel (Paul, II, 602); that after leaving the North Channel the vessel's speed would be retarded by the force of the wind and sea (Id. 604-5), and that the sea on that day would reduce her speed about three knots (Id. 606). He also says that when he gets a *full speed* order from the bridge he puts his engine about 77 revolutions, and that *full speed is 77 revolutions* (Id. 617-18); that Captain Kidston must know that 77 revolutions is the ordinary full speed of the vessel when telegraphed from the bridge, and that, if a greater number is wanted, he sends a written order to the engine room naming the revolutions desired (Id. 620); that aside from unusual conditions *77 revolutions is a fixed number of revolutions on a full speed order from the bridge, and at these revolutions the vessel can make 15 knots* (Id. 624-5); that the order sent to him at his room to put the engine at 76 revolutions, reading: *Please slow to 76 turns per min.*" (Id. 633) was received at 3:10 P. M., and that it went from him immediately to the engineer on duty at the time in the engine room (Id.

629-30); that you must *experiment* with the engine before one would succeed in reducing from 77 revolutions to exactly 76 (Id. 632). He further said that he did not know the slip of the propeller at any time on the day of the collision (Id. 658), and did not know from where the information came that the "Beaver" was making only *11 knots* (Id. 651). Mr. A. J. Frey, who answered the fifth interrogatory of the freight libel, said that to the best of his recollection he got his information that the speed of the "Beaver" was *11 knots* from the engineer's log (Frey, II, 718).

The record of the engine room bells rung up from the bridge shows that the *"Beaver's" engine was put at full speed at 1:04 P. M. and remained at full speed without change until 3:15 P. M.* (Paul, II, 649). Captain Kidston, testifying in this case, said that at 3 o'clock the "Beaver" was making in the neighborhood of *12 knots,* and that the vessel had cut her speed down three knots (Kidston, III, 804). On cross-examination he said that when he gave the order at 3 o'clock to slow to 76 revolutions, he wanted the "Beaver" to make *about 12 knots,* and that *12 knots would be a reduction of the speed which the vessel had made through the North Channel* and also up to Duxbury Reef (Id. 861-2); and that he made a calculation at the time, which showed that the "Beaver" passed from Red Buoy No. 2 in thirty minutes, *a distance of 6½ miles*, which would be a speed of 13 knots (Id.).

Captain Kidston further said that *he was complying with the moderate speed requirement of Article 16 when he was making 12 knots* (Id. 864); that he knew when

he gave the order at 3 o'clock to reduce the revolutions to 76 that the engineer would, *within five or six minutes,* be able to execute the order (Id. 866), and that this order was not intended to reduce the speed of the ship, but to establish a fixed rate of speed (Id.), although he said that at 3 o'clock the fog had shut down thick (Id. 854) and, if there had been no fog he would not have bothered about reducing from 77 to 76 revolutions (Id. 867). He further said that the swell was a *long, smooth one* (Id. 870) and, after he got clear of the North Channel, it would retard the speed of the "Beaver", and it did this after leaving Duxbury Reef to the extent of three knots per hour (Id. 869). "*At most times*" the witness differs with the statement found in the Coast Pilot book issued by the Geodetic Survey to the effect that "*immediately outside the bar there is a slight current to the northward and westward known as the Coast Eddy Current*" (Id. 872); and he said that such a current, if it was setting with the ship, would help to overcome the retarding effect of the swell (Id. 873). The witness then said that he had made a mistake in his testimony before the United States Inspectors when he said the speed of the "Beaver" was 11 knots (Id. 878); that he did not know where Mr. Frey got the information embodied in the answer to the fifth interrogatory made in the freight suit (Id. 880), and that the statement therein contained was not in accordance with the facts (Id.). He further said that the rule was to stream the "Beaver's" log and set it at zero at Red Buoy No. 2, and that he presumed the order was carried out on the present occasion (Id. 883-4); that the log

was hauled in immediately when he gave the full speed astern order at 3:15 P. M. and that the reading *reported* to him was 19.6 (Id. 812). As bearing on the character of the swell into which the "Beaver" was headed that day and which, in the opinion of the witness, reduced the speed of his ship three knots per hour, he says: *"I have made as low as five knots with that same ship in a heavier swell"* (presumably with the engine at full speed) (Id. 864).

We do not desire to unnecessarily prolong this brief by a detailed examination of the evidence of the various *experts* on the extent of the effect of a head swell on the speed of a ship of the "Beaver's" type. The three experts called for the appellant, Mr. James Dickie, Mr. Heynemann and Mr. D. W. Dickie, are men of eminence in their profession, especially Mr. James Dickie, who has an international reputation. All three of these gentlemen squarely testify that *such a head swell would not materially retard the "Beaver's" speed* and give sound reasons for so testifying (see especially James Dickie, II, 460-1; III, 1101-2). We ask the court to read their evidence and it will be sufficient to say that, as between them and the experts called for the "Beaver", there is an irreconcilable conflict, and perhaps necessarily so, because the matter must be dependent on variable conditions. Neither is the run of 19.6 knots, as reported shown by the "Beaver's" log, of any importance, for the reason that, aside from its hearsay character, its reliability depends solely upon the accuracy of the knowledge of the time and place the log was set. There is evidence that it was *ordered* set at a certain place,

but whether it was or not can only be guessed at, for the quartermaster, whose duty it was to obey the order, *was not called as a witness,* and all that is definitely known about the matter is that a whistle was blown by the second officer from the bridge which meant that the time had arrived for the quartermaster to perform a certain duty,—whether he did it at that particular time or not is pure conjecture. *In view of the fact that the written order given to the quartermaster at 3 o'clock to reduce the revolutions of the ship's engines was not delivered until 3:10 P. M.,* we submit that it is not at all improbable that the execution of the whistled direction to stream the log may have been similarly delayed, and, in view of the facts which we now propose to discuss, this must have been the case.

The legal test of the speed of a vessel, with reference to other vessels, which are themselves moving, is her speed *through the water* and not *over the ground* (*The Yarmouth,* 100 Fed. 667). Judged by this test, the swell so much talked of in this case becomes immaterial (except as regards the point of collision); the vessel was making *her full speed through the water, and this was at least 15 knots.*

A DETERMINATION OF THE APPROXIMATE PLACE OF THE COLLISION WILL SETTLE CONCLUSIVELY THE SPEED OF THE "BEAVER".

We fortunately have in this case a determined fixed rate of speed over the ground which the "Beaver" is known to have made between two fixed points, namely: between the North Heads, which she passed at 1:37 P. M., and Red Buoy No. 2, which she passed at 1:45

P. M. With her speed known to be *15 knots* at this time, and her engine remaining unchanged for the next hour and a half, or until 3:15, we can know the distance traveled and at what rate of speed over the ground, if the point of collision can be fixed. If the rate of 15 knots remains unchanged from 1:37 to 3:10 P. M., the place of the collision can be approximately fixed, for from 1:37 P. M. to 3:10 P. M. she would have traveled 23¼ miles on a straight course at the rate of 15 knots per hour (Lie, I, 187; D. W. Dickie, II, 360; Heynemann, II, 385; James Dickie, II, 428). In discussing the distance traveled over the ground by the "Beaver" we need not consider the attempted reduction of her engines' revolutions at 3:10 P. M. from 77 to 76, for the reason that the uncontradicted evidence is that the reduction in distance traveled *(assuming that the reduction was accomplished at exactly 3:10 P. M.)* would be but 83.45 feet less than it would have been had the revolutions remained at 77 up to 3:15 P. M.

In determining the place of collision it is appropriate to examine the matter in the light of the movements of both ships. On the part of the "Beaver" we know that she was going at *full speed* practically up to the moment of collision, and we know that at full speed she could make and had been making 15 knots over the ground up to Red Buoy No. 2. These are established facts. If the place of collision is that fixed by Captain Kidston, six miles from Point Reyes light and four miles from South End, then the "Beaver's" speed over the ground after leaving Red Buoy No. 2, although still *full speed through the water,* was unwittingly reduced to between twelve and

thirteen knots by the swell or some other unknown cause. On the other hand, if the point of collision is at the place fixed by Captain Lie, then the speed of the "Beaver" over the ground remained at approximately 15 knots up to the time of the collision.

We propose, therefore, to now examine the appellant's case touching the movements of the "Selja" prior to the collision, and the facts now to be adverted to are established by the testimony of the officers of the "Selja", and on the material points there is no conflict.

At 2:30 P. M., while the "Selja" was on a course of S. 60° E., the Point Reyes siren was heard bearing east by north. This is the basic fact which, if found, destroys absolutely appellee's contention that the collision occurred some six miles from Point Reyes. Continually hearing this siren at intervals of thirty-five seconds, the "Selja" proceeded on her S. 60° E. course at 40 revolutions of her engine, or at a speed of 6 knots per hour, until 2:50 P. M., when she changed her course to S. 65° E. and this course remained unchanged until the collision. The "Selja's" six knot speed was maintained until 3:05 P. M., when it was reduced to slow, and at 3:10 P. M. her engine was stopped and remained stopped until the "Beaver" loomed in sight.

All the facts stated in the foregoing paragraph are conclusively established by the testimony of the "Selja's" officers, which is very brief and should be read in full (I, 42-132). This testimony was taken on December 2nd, 1910, only ten days after the collision, before the appellee's defense had been even outlined, and when the events were fresh in the minds of the witnesses.

Captain Lie knew that the whistle was the Point Reyes signal, because it could have been nothing else (Lie, IV, 1175-6). Point Reyes was the very point they were making for (Bjorn, I, 110).

Learned counsel in the lower court did not offer one helpful suggestion as to what other signal it could have been, for they know it could have been nothing else. We cannot forbear calling the court's attention to Captain Lie's righteous indignation when, during his cross-examination, months after the collision, the remarkable suggestion that he did not hear a whistle at all was first made to him:

> Q. Don't you know you didn't hear that whistle at all?
>
> A. That I didn't hear it?
>
> Q. Yes.
>
> A. I know that's a damned lie. I deny it. I heard it.
>
> Q. Don't say damned lie to me, Captain. Don't you know you didn't hear it at all?
>
> A. That astonishes me for you to say I didn't hear that whistle. Do you think you can scare me? I don't want you to treat me like a liar, because that is absolute that you believe I am lying; you must believe it.
>
> (Lie, IV, 1175-6.)

It is a well established principle of law, than which none is better grounded, that the testimony of witnesses aboard a vessel as to what they and that vessel did is to be preferred to testimony of those on another vessel.

> "What a witness asserts he did, or did not do on his own vessel at the time, is generally more satisfactory evidence of the facts than the opinion and

belief of a dozen others formed from what they supposed they saw or heard on another vessel."

The Steamboat Neptune, Olcott, 495, cited with approval in *The Fannie,* 11 Wall. 238 (20 L. Ed. 114).

See also:

The Geo. W. Elder, 203 Fed. 523, 534;
The Hope, 4 Fed. 89;
The Philadelphian, 61 Fed. 862;
The Sam Sloan, 65 Fed. 125;
The Natchez, 78 Fed. 183;
The Captain Sam, 115 Fed. 1000;
The Dorchester, 121 Fed. 889.

In the case at bar the facts referred to, as established by the testimony of the "Selja's" officers, are only disputed through *inferences* drawn by appellee *from other disputed facts.* Indeed, considering the numerous conflicting statements of the "Beaver's" own witnesses as to what her speed was, it is difficult to place any reliance whatever on her testimony in this regard.

We, therefore, submit that it is conclusively established that the "Selja" heard the Point Reyes whistle at the times testified to, that she was on the courses testified to, that her speed was as testified to, and that her engine ran as testified to.

For thirty-five minutes, then, the "Selja" was proceeding towards the place of collision at the rate of 6 knots per hour, and for five minutes at the average rate of something more than 3 knots per hour. Under the six knot speed the distance traveled for the thirty-five

minutes would be 3 knots and 3,040 feet, and for the remaining five minutes (under the reduction from half to slow speed), 2,025 feet (Libelant's Ex. 1). It is admitted by the answer of the claimant and the uncontradicted evidence shows that at about 3 o'clock the "Selja" heard the "Beaver's" whistle. At that time, according to the testimony of Captain Lie, the vessels were 4.83 knots apart.

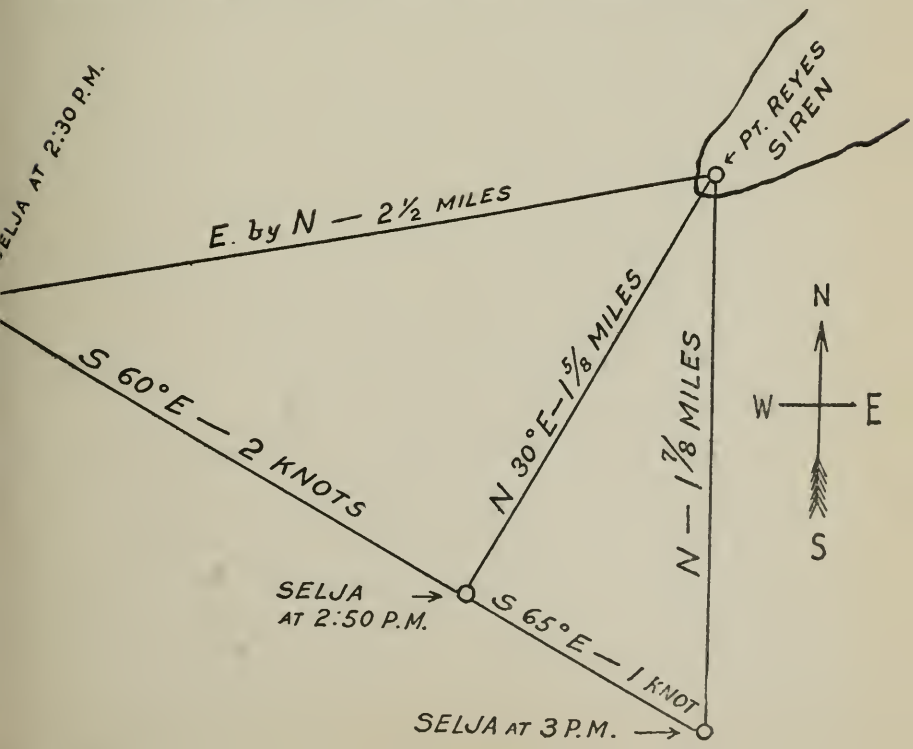
The question as to the approximate accuracy of Captain Lie's work in fixing the various *bearings* of the Point Reyes siren is an important one, for if, at 2:30 P. M., when it was first heard, it bore East by North, and at 2:50 P. M., N. 30° E., and at 3 P. M. due North, or if these bearings were but approximately accurate, then we submit it would be physically impossible for the "Selja" to have reached the place of collision, as fixed by Captain Kidston, at 3:15 P. M. Captain Kidston's report to the United States Inspectors (IV, 1479-82) states that from the place of collision Point Reyes bore N. W. by W. ½ W. 6 miles, and South End N. W. ½ N. 4 miles. On Libelant's Exhibit 1, the map of Drake's Bay, Captain Lie has marked these two bearings: the Point Reyes "(1)", the South End "(2)", and the point where they would intersect "(3)" (Lie, I, 196). He was then asked how far the "Selja" would have to travel to reach that point of intersection by 3:15 P. M., if at 3 o'clock the Point Reyes siren bore due North, and he replied that she would have to travel 5.6 knots and that the rate of speed would be 22.4 knots per hour (Id. 196-7).

Captain Lie heard the first siren blast at 2:30 P. M. loud and clear (Id. 157); he did not expect to hear it so strong because his sailing directions said that the sound was obscured to the northward (Id). The first whistle sounded between three and four points on the "Selja's" port bow. The compass bearing of the second whistle, thirty-five seconds later, was East by North (Id.). The distance traveled by the "Selja" on her S. 60° E. course from 2:30 P. M. to 2:50 P. M. was logged and found to be 2 knots, and the bearing was again taken at 2:50 P. M. and found to be abeam of his ship, or N. 30° E. (Id. 158). The soundings which had been taken up to that time, and the distance run, were then plotted by Captain Lie on his chart. From 2:50 to 3 o'clock the "Selja" traveled another knot, and at 3 o'clock another compass bearing of the siren was taken and found to be due North (Id. 159). Is it possible that, hearing that siren every thirty-five seconds loud and clear for half an hour, these *bearings* could be appreciably wrong? They would have to be wrong to absurd limits if the place of collision is as fixed by Captain Kidston. Captain Kidston himself had no trouble in fixing the bearing of Duxbury Buoy whistle when he heard but two of them (Kidston, III, 863).

The distance run between 2:30 P. M. and 2:50 P. M., as found by the "Selja's" log, checked up and verified the bearings found at 2:30 and 2:50 respectively. In other words, if the bearing taken at 2:50 after a run of 2 knots had not been N. 30° E., it would have conclusively shown that either the distance run was wrong or else the first bearing of East by North was wrong. And

the bearing of the Siren due North at 3 o'clock proved the correctness of the bearings taken at 2:30 and 2:50 respectively (Lie, I, 341-2), as well as the distance it was off at those respective times (Id.).

At the time of hearing the siren at 2:30, Captain Lie did not know its exact distance away, but he later ascertained it to be 2½ miles (Id. 158). In plotting his data after 2:50 P. M. he found that the "Selja" at that hour was 1½ miles from the siren (this was afterwards checked up on a chart of larger scale and found to be 1⅝ miles). At 3 P. M., when the siren was sounding due north, he did not know the distance, but, a day or so after the collision, he plotted the data and found the distance at 3 o'clock to be 1⅞ miles (Id. 160). The accompanying diagram will show the situation clearly:



Of course, with the bearings fixed and also the course and distance run, nothing else is required to mathematically fix with exactness the distance the siren was from the "Selja" (Id. 342). It is hardly possible, hearing this strong siren blast of two or three seconds' duration, sounding at intervals of thirty-five seconds for thirty minutes, sound in fact nearly fifty times—that a skilled, alert, well trained navigator, such as Captain Lie showed himself to be, could have been appreciably in error in the bearings of that sound. His whole attention at the time must have been given to the matter, for it spoke to him the end of his long voyage across the Pacific.

We have said little in the foregoing argument as to the *soundings* taken by the "Selja" for the reason that we do not think them of great importance. However, when one commences to compare soundings actually taken on a vessel with those shown on a chart, and expects to find them in absolute harmony, he is looking for the impossible. The soundings shown on a chart are taken at a certain tide and at certain points. If your vessel is passing over those certain points at the time when the height of water is the same as it was when the chart soundings were taken, then your soundings from the vessel and on the chart would perhaps correspond, but otherwise not.

In conclusion of this subject we confidently submit that the established movements of the "Selja" verify and confirm Captain Lie's statement as to the place of the collision, and, as a consequence, clearly show that the speed of the "Beaver" prior to the collision was full speed and at the rate of 15 knots per hour over the

ground, or approximately 1520 feet per minute. In a fog so dense that objects were invisible at a distance of more than nine hundred feet, the "Beaver's" speed was maintained with never a thought of reducing it. She was going as fast as she would have gone had the sea been bathed in sunshine and the horizon visible for miles around. Captain Kidston wanted and he had "the *full power on the ship*" (Kidston, III, 867). Going at such a speed, the absolute futility of attempting to stop after sighting a vessel and before colliding must have been known to the "Beaver's" master, but he seemed not to have cared. He came near running down two fishing boats (Johnson, IV, 1230, 1245); he heard their whistles ahead, but nothing seemed to move him from his lethargy,—he was late and other vessels must keep out of his way. Providentially the fishing boats did, but he found his victim in the unfortunate "Selja".

> "It does not require more than a statement of the case to show that whatever view one takes of the important points of conflict between the parties the 'Oravia' is clearly to blame. Counsel for the defendants was practically driven into the unpleasant position of having to admit that, when it was pointed out, on the evidence of the master of the 'Oravia', that vessel was going at 10 knots at least—it may have been a little more—in a fog, which was so thick that he could not see more than three or four hundred yards, and the case of the 'Oravia' is hopeless for that reason.
>
> * * * * * * *
>
> To say that this is a moderate speed is really hopeless and one must say that, notwithstanding the long experience and high character of the master of the defendant ship, I am afraid this part of the case is simply an example of taking the risk of going too fast in the expectation that there is nothing in the

way, and that, if there is anything, their whistles will be heard in time to stop and reduce speed."

The Oravia, 10 Asp. 434.

The Circuit Court of Appeals in *The Columbian,* 100 Fed. 991, a case to which we will refer again, says of that vessel's speed:

> "The steamer was clearly in fault for excessive speed (9 or 10 knots). Indeed, considering the known frequenting of the locality, her speed was without due regard for human life. This is none the less true because the frequent condemnations by the courts of excessive speed in fogs has not yet broken up what is described in the *Umbria,* 166 U. S. 404, 409; 17 Sup. Ct. 610, 612; 41 L. Ed. 1053, 1057, as a 'custom' which 'implies a flagrant disregard of the safety of other vessels'."

The speed of the "Beaver" was so great that in a fog such as existed no precautions could have been taken by a vessel in her track to get out of her way. Of course, if her frenzied speed could have been foreseen, then the "Selja" could have saved herself. As it was, the "Beaver" steamed in utter disregard of the rights of other vessels, which might have been and were using the waters of that locality, and the argument of counsel in the lower court seemed to savor of the suggestion that, even though the "Beaver" was running amuck, the Norwegian ship should have known it and given her a wide berth. We know of no rule of law which would charge the "Selja" with such knowledge.

Mr. Flood, Norway's representative at the International Marine Conference of 1897, in speaking of speed in a fog, said:

> "Safety at sea depends more on regulations of speed in thick weather than anything else. You may illuminate your vessels from stem to stern; you may furnish them with fog signals so as to make the whole vessel a gigantic music-box; it will do no good, unless the speed, in foggy weather * * * is reduced within reasonable limits."
>
> Protocol of Proceedings, Vol. I, p. 426.

We have gone into this question of the speed of the "Beaver" at this length because of the time spent in the lower court on this subject, and also to place the facts fully before this court. We again repeat, however, that it is not a matter of great importance whether the "Beaver" in fact made 15 knots or whether the weather and sea conditions reduced her speed to 13 or even 12 knots, or even whether the point of collision is the one fixed by Captain Lie or that fixed by Captain Kidston (see Lie, IV, 1188). *The point is that the "Beaver" was running at her full speed in a dense fog and committed as gross a violation of the rule as to moderate speed as any vessel could commit.* Her share in the responsibility for the collision is, therefore, clearly and definitely established, and we have dwelt on the evidence on the subject rather to show the enormity of her fault than to establish the fault itself.

II.

The "Beaver's" Gross Violation of the Stopping Requirement of Article 16 as Well as the General Prudential Requirements of Article 29.

While the excessive speed of the "Beaver" was her main fault, and so reprehensible as to overshadow all

else, it was not her only fault contributing directly to the collision and the loss of the "Selja", for, besides changing her helm between the "Selja's" first and second whistle, and before sighting the "Selja", under most *condemnatory circumstances* she violated the stopping requirement of Article 16, as well as failed to reverse her engines on hearing the "Selja's" first whistle, as was made mandatory by Article 29, because the *"special circumstances"* at that time were so manifestly present as to call for instant action to retard the ship's alarming forward movement. These faults appellee has not confessed, but the uncontradicted testimony of its own witnesses so convincingly establishes them that they might as well have been.

The situation surrounding the navigating officer on the "Beaver's" bridge, when the "Selja's" first whistle was heard, can in no way cloak his conduct with that measure of discretion sometimes allowed in moments of imminent danger. It is true as a matter of fact that the situation was fraught with sickening peril, but its imminency played no part in the action or inaction of this officer. What were the known circumstances immediately attendant upon the threshhold of this tragedy? This fine passenger boat, laden with its human cargo, almost at the entrance of the largest port on the Pacific, was proceeding at a frightful speed *along the customary track of vessels coming down the coast* (several having already been passed dangerously close) through a fog so dense as to have made it physically impossible, after coming in sight of another vessel, to overcome her headway before a collision. Under these circum-

stances, necessarily known to have been fraught with continuous peril, where nothing but the sanest, most prompt and energetic maneuvers would be of the slightest avail to avert an ever present disaster, where the lives of the ship's passengers were absolutely dependent upon constant vigilance, cool judgment and quick skill; under these circumstances, the man of all others especially selected to cope with all situations of peril, the man solely responsible for the existence of this particular peril, was not at his post of duty but had turned the navigation of his ship over to the second officer.

A steamer's whistle was heard almost dead ahead and so indistinctly that the quartermaster on the bridge with Ettershank said: *"Did you hear that whistle?"* (Ettershank, II, 506). Yes, Ettershank had heard the whistle and, in the crisis thus precipitated through the whistle's warning, what did he do? *He sent for the absent master* (Id.), and in so doing robbed the "Selja", as far as any act of his was concerned, of her last possible escape from certain destruction. Ettershank must be charged with full knowledge that, in navigating that ship at her full speed, under the then existing circumstances, he was doing so in *continuous* violation of a law intended to prevent the happening of the very thing that the "Selja's" first whistle foreshadowed to him. Yet, in face of the ominous warning to *stop* his vessel's speed, he continued to persist in it and, as a substitute, sent for the absent master.

We submit that, as the navigating officer of the "Beaver", Ettershank's breach of his legal duty to

instantly, when so warned, do all in his power to meet and counteract the responsibility which his then existing wrongdoing carried with it, fastened upon him *the added transgression of failing to stop and reverse his ship's engines.* Had he acted with the skill and promptitude *demanded by these circumstances of his own making* there would have been no tragedy. If he was not conscious of his responsibility, or of the ever constant danger involved in his ship's speed; if he was deficient in judgment or had been denied the right to act in time of peril further than to send for the master; then he had no place on the bridge of that ship and to have placed there such a man, restricted either mentally or by rule, was in itself a clear violation of Article 29 directly contributing to the collision, for it was the neglect of a most obvious precaution required by the special circumstances, under which the "Beaver" was then being navigated, not to have had the navigation of the vessel in the hands of one fitted in every way to meet, as far as human judgment and foresight could do so, the unknown contingencies inevitably to be expected. An officier who knew no more or had no more power given him than to send for the absent master in the face of such a warning, given under such compelling conditions, was no better than a child,—an automaton, whose very presence on the ship's bridge as her navigation chief was a continuing menace and all but criminal.

Kidston promptly complied with Ettershank's message and, when he asked, *"Is the whistle close aboard?"* was informed *"It was indistinct—I did not hear it very loud"* (Kidston, III, 895). Thereupon, with full con-

sciousness of the risk he was running in not *instantly* doing what Ettershank had failed to do, he said, *"We will hear it again—I will get it myself"* (Id.). And, while waiting to "hear it again", and in total ignorance of the position of the vessel, whose warning he was to hear again, *he created a new situation* of peril by ordering the "Beaver's" wheel put to starboard (Id., 896). A more reckless order under the known circumstances could hardly have been given, for, in ignorance of every vital fact which would bear on the propriety of changing the vessel's course, the existing risk was deliberately increased through the taking of the chance of shooting clear of the unknown on another course. Kidston must have recognized that to the peril of his ship's immoderate speed there had been suddenly and definitely added this unlocated peril ahead, but he was fifty minutes late already and, rather than sacrifice the call for speed in a fog, he deliberately increased the peril by taking another chance, the consequences of which were to him totally unknown.

Captain Kidston then heard the whistle himself, and immediately concluded he had done wrong in starboarding and that the unseen vessel ahead of him was *crossing his course,* and acting on this assumption he put the "Beaver's" wheel hard-a-port (Id. 800). *A few seconds* later the "Selja" loomed in sight lying in the very direction in which the "Beaver's" course had last been put. Kidston admits that had he not made this last change of the wheel the collision would not have occurred (Id. 903).

The conduct of these two officers in failing to stop the ship's engines under the circumstances related was in direct violation of the stopping requirement of Article 16, as well as the general prudential requirement of Article 29, and in both instances these acts were proximate causes of the collision. From this conclusion there can be no escape, for the facts are uncontradicted and show that the things done and the things left undone, between hearing the "Selja's" first whistle and before sighting her, were deliberate acts uninfluenced by excitement or other circumstances usually attendant upon maneuvers performed when vessels are in sight of each other and in extremis. The only known warrant for excitement lay in the reckless speed of their ship, but, if this cause of their own making affected their actions in the least, the record does not disclose it. Furthermore, Ettershank's fault on hearing the first whistle was equally Kidston's, for the latter was fully apprised of the whistle's uncertain position, and yet he waited to hear it again. The gravity of their faults lay in the conscious knowledge that, because the "Beaver" at the time was in the actual violation of the speed rule, the obligation to obey, when warned, the associated requirements to stop and reverse became doubly imperative. The stopping requirement of Article 16 presupposes that the moderate speed rule is being complied with,—if it is not, then the danger in hearing an unlocated whistle ahead is vastly increased and, of course, as the danger is increased, the obligation to obey the rule becomes the more pronounced. In truth, a warning, such as was given to these men, carried with it not only a peremptory demand that the ship's engines be stopped and re-

versed, but also in emphatic measure it called to their consciousness their then present wrongdoing. Yet all went unheeded—they were making up for lost time in starting and were bent on taking any chance that would further that end.

Furthermore, with the "Selja" just about at a standstill when first sighted, and her signal immediately being given that she was going full speed astern, the situation showed that the "Beaver" actually and deliberately followed up and ran down the retreating "Selja". If a minute elapsed between the three whistles of the "Selja", showing her retreating movement, and the collision, then, it was another grave fault that Captain Kidston did not throw the "Beaver's" wheel back to starboard. Had this been done the "Beaver", if she had struck at all, would have done so forward of No. 2 hold, and such a blow the "Selja" might have survived. Having had the report from Ettershank that the whistle was one point on the "Beaver's" starboard bow, having a minute later himself located the second whistle as one point on the starboard bow, and, a few seconds later seeing the ship on his starboard bow headed across his course, Captain Kidston must have known that the "Selja" was making little, if any, forward movement and was in a favorable position to respond almost immediately to a stern movement. Being notified that she had commenced such stern movement, when the vessels were approximately nine hundred feet apart, it would seem to have been the height of folly for Captain Kidston to have allowed the "Beaver's" wheel to remain as it was. The only chance of avoiding

the collision with the wheel that way lay in the ability to stop the "Beaver's" headway before she could reach the "Selja"; while, if the wheel had been instantly put hard-a-starboard on sighting the "Selja", there would have been given the other chance of clearing her bow.

We submit, in concluding this subject, that we have clearly shown gross fault on the part of the "Beaver" in the violation of both parts of Rule 16 and of Rule 29. As her immoderate speed was admitted, it might fairly be said that much of this discussion was unnecessary. As, however, the lower court held that the principle as to major and minor faults did not apply, and that both vessels were equally at fault, it has seemed appropriate to deal fully with the faults of the "Beaver" so that later they may be contrasted with the alleged faults of the "Selja", to which latter subject we now pass.

Faults Charged Against the "Selja" Which Are Said to Have Contributed to the Collision.

We would preface a consideration of this subject by reverting to the fact that not only does appellee stand convicted of fault by its own belated confession as to immoderate speed, but it also is clearly convicted of further faults as shown by its conduct after the "Selja's" first whistle was heard and before the vessels had come in sight of each other, these latter faults being established by its own uncontradicted evidence, and being each in itself sufficient to account for the collision. Furthermore, all the "Beaver's" faults

existed at the time of the collision and consisted of the breach of statutory rules. In approaching, therefore, the subject of the "Selja's" alleged contribution to the collision, we would ask the court to bear in mind the matters above suggested.

Under an analogous situation Mr. Justice Brown, speaking for the Supreme Court, said:

> "Upon the findings of the Circuit Court there can be no question of the gross negligence of the steamship. She was not only not running at the moderate speed required by Rule 21, but she failed to take the proper precautions when the proximity of the sailing vessel became known to her. Upon hearing the fog horn of the barque only one point on her starboard bow, the officer in charge should at once have checked her speed, and if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other. Indeed, upon the testimony in this case, it was open to doubt whether, if the engines had been at once stopped, the steamer would have come to a standstill, before she had crossed the course of the barque. There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it *by a change of the helm,* without taking the additional precaution of stopping until its location is definitely ascertained." (Citing cases.)
>
> * * * * * * * * *
>
> "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account

> for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."
>
> *Alexandre v. Machan* (The City of New York), 147 U. S. 72 (37 L. Ed. 84; 90).

More appropriate words could hardly be found.

To begin with, the "Selja's" claimed contribution to this collision rests on two absolutely inconsistent contentions; first, it is said she contributed through her failure to stop her engines two or three minutes after 3 o'clock when the "Beaver's" first whistle was heard, and that this was a continuing fault up to the time she did stop them, some six minutes before the collision; and second, it is contended that the "Selja" was stopped in the water and had no way upon her for *ten minutes before the collision,* and contributed to it in failing to blow two whistles as indicating that fact as required by subdivision b of Article 15.

It will be noted that, besides their inconsistency, neither of these contentions, if true, played the slightest part in influencing the maneuvers of the "Beaver", whose speed and conduct would have been the same in any event. Their inconsistency, moreover, is plainly seen from the uncontroverted record, for, it being *admitted by the pleadings* as well as proven by the uncontradicted testimony of the navigating officers of the "Selja" that, when the "Beaver's" whistle was first heard, she was going at half speed or 6 knots per hour;

and it further being proven by the same testimony that at 3:05 her engines were put at half speed or 3 knots; it would have been a physical impossibility for her to have been *stopped in the water with no way on her* for ten minutes before the collision, unless she had stopped her engines sometime *before* hearing the "Beaver's" whistle at 3 o'clock and had not put them in motion again, and, of course, the inconsistency increases as and when applied to the succeeding whistles of the "Beaver".

That appellee should deem it expedient to resort to inconsistent theories on which to base a charge of contributory negligence is clearly indicative of uncertainty as to the conclusiveness of either. While it may be helpful sometimes to charge cumulative faults, it certainly is an admission of weakness to attempt cumulative charges of such character that proof of the truth of one must necessarily defeat the other. As we have no means of forcing appellee to an election of its inconsistent contentions, of necessity we must discuss both of them. It would, however, seem proper to fairly and squarely ask counsel for appellee whether, *on the facts,* they contend that there was a violation of Rule 16 as well as of Rule 15, and we now specifically ask them, if they so contend, to explain fully how *both* rules were violated.

We would also say that certain further and minor faults were briefly charged against the "Selja" in the lower court. We do not believe, however, that they will be relied on in this court and feel that it is useless to go into them at this time. The case of *The Umbria,* hereafter cited, will, we believe, fully meet any and all of such minor charges of fault.

III.

The Contention That the "Selja" Had No Way on Her for Ten Minutes Before the Collision and Violated Rule 15 by Not Indicating That Fact to the "Beaver" by Two Whistles.

Although this contention was strenuously made by the appellee in the lower court, we do not take the same very seriously. We believe that the following facts are absolutely established in this case and can only be found to be untrue by discrediting the evidence of all of the "Selja's" officers:

1. That at 3 p. m. the "Selja" was proceeding at a six knot speed and so continued until 3:05 p. m. This fact is also *squarely admitted in the pleadings* (I, 25; IV, 1468) and, of course, cannot now be controverted.

2. That at 3:05 p. m. the "Selja" reduced her rate of speed to three knots, which rate was continued till 3:10 p. m.

3. That at 3:10 p. m. the "Selja" stopped her engines.

If these facts are true, it is an *absolute impossibility* that the "Selja" was at a standstill for ten minutes before the collision, or, indeed, at any time before sighting the "Beaver". Upon such a subject a mathematical demonstration is surely far more satisfactory than any other evidence that could be procured, especially where, as in this case, the "Selja's" engines had never been tested to determine how long it would take to stop the vessel (Lie, IV, 1263). And Mr. James Dickie, Mr. Heynemann and Mr. D. W. Dickie all squarely testify

that the "Selja" could not have stopped by 3:15 p. m. They in fact go much further than this and testify that if the "Selja" were making three knots, and her engines were stopped *but not reversed,* she would not be *dead in the water* for about *nine minutes and fifty-two seconds* thereafter, and at the end of five minutes would still have a speed of three-quarters of a knot (II, 365, 413, 435; IV, 1097). Had there been any expert evidence to the contrary it would surely have been procured, yet none was forthcoming, although the record shows that counsel had taken the matter up (III, 1009). The proposition as to when a tramp steamer like the "Selja", of a type known all over the world, can be stopped when going at a certain rate of speed would certainly seem demonstrable with at least *substantial* accuracy. If a vessel like the "Selja", going at six knots at 3 p. m., reducing to three knots at 3:05, and stopping her engines at 3:10, can entirely lose her headway in less than five minutes, while expert constructing engineers say that it would take over nine minutes, how can vessels be built at all with any reliance on the builders? We submit that, while expert testimony has its limits of usefulness, it would be a shattering of all formulas to hold that the "Selja" could have come absolutely to rest in this case before sighting the "Beaver". We do not think that this court will reach a conclusion on this point, which any constructing engineer could prove ridiculous, and which appellee has been wholly unable to substantiate. And it will not do for counsel to say that the experts did not allow for sea and weather conditions, for these conditions in this case favored the "Selja". If the speed of the "Beaver" was, as con-

tended, retarded by an adverse swell, the speed of the "Selja" would in consequence be *accelerated* by a *following swell.* And when we add to these proven facts Captain Kidston's statement before the inspectors that he could not judge whether the "Selja" had headway or not (III, 839), it would seem that appellant has demonstrated as far as could be done the absurdity of the claim that the two whistle rule applied in this case.

Appellee's contention in this matter undoubtedly got its excuse and conception from the translated copy of the "Selja's" log, wherein is found the statement that at 3:10 p. m. the vessel was *"nearly at a standstill"*, in connection with certain admissions alleged to have been made by Captain Lie to various parties.

As regards the entry in the log we would say that it amounts to nothing, for the log also shows that from 3:05 to 3:10 the "Selja" was proceeding at a speed of three knots and *she could, therefore, only be "nearly at a standstill" so far as her prior speed permitted her to be* (see Lie, IV, 1163). Moreover, when a vessel gets down to a three knot speed, it might well be said as a matter of fact that she was nearly at a standstill (Id. 1161), for she would be going simply at the rate of an ordinary pedestrian.

As to Captain Lie's alleged admissions, we think that they are entitled to very little weight, even if they were made, and such, we submit, is the law.

Whitney v. The Empire State, Fed. Case No. 17,586, at p. 1089;

The Hope, 4 Fed. 89, 96;

The Roman, 14 Fed. 61, 62.

In *The Empire State,* supra, the court says:

> "In arriving at this conclusion, I have attached little or no importance to the great mass of testimony introduced in the case, relating to conversation had with the crew of the schooner after the accident. This description of testimony, although often proved in actions for collisions, has, in most cases, been held by the court to be entitled to little weight in determining disputed questions of facts appertaining to the navigation of the respective vessels. * * *"

We do not believe, however, that the admissions in question were made. It is claimed that just after the collision, at a time when Captain Lie was "very nervous" (Ettershank, II, 511), and "wet and shivering" (Kidston, III, 814), he had a conversation with Captain Kidston on the bridge of the "Beaver", wherein he said that the "Selja" had been at a standstill for over *ten minutes.* It is also claimed that in a conversation with Captain Bulger three days later, he said that he had been stopped *for ten minutes.* As all these conversations relate to a stoppage of *ten minutes,* they obviously were admissions of something *untrue in fact,* for it is admitted by the pleadings that the "Selja" was proceeding at a speed of at least *six knots* up to 3:05 p. m., and these pleadings were drawn long after the alleged admissions were made. It is also exceedingly surprising, if these statements were in fact made, that no reference was made to them at the hearing before the Inspectors either by Captain Kidston or Inspector Bulger, and it is also surprising, if Lie in fact made the statement in question to Captain Bulger, that he should on *the very same day* have testified before

Captain Bulger that he still *had some headway when the "Beaver" was sighted* (Bulger, III, 963-5; Kidston, III, 841-4). It is further surprising that, *after* the alleged admission to Kidston and *before* the alleged admission to Bulger, Captain Lie should have signed his log stating that the "Selja's" engines were not stopped till 3:10 p. m. It is not, however, necessary to raise any issue of veracity on this point. Captain Lie, while denying absolutely that he made the admissions in question, and squarely testifying that his vessel still had headway when the "Beaver" was sighted, states that he *might* have said that he stopped his *engines* at *ten minutes after three* (Lie, IV, 1271) and, remembering that he is a Norwegian and perhaps did not express himself with facility, his language in the alleged conversations may have been construed as the witnesses for appellee construed it.

As to the testimony of the "Selja's" chief engineer, Mr. Eggen, that in his judgment the "Selja" would stop in two or three minutes, it is of little value unless he had tested the ship and no such test had been in fact made (IV, 1263). Captain Bulger himself practically admits that the master rather than the engineer would have this knowledge (III, 969-970).

Another interesting sidelight on the matter is to be found in appellee's answer in the case, where the following confused and contradictory allegations appear:

> "Alleges that the 'Selja' continued on her course without stopping her engines *for many minutes at a high rate of speed* in said fog, to-wit, more than 6 knots per hour, *until she was thereby driven forward to the point where her course crossed the*

> *course of the 'Beaver' where she was allowed to stop dead in the water;* alleges that she lay at a standstill in the water where she had been thus driven across the course of the 'Beaver' for many minutes, as claimant is informed and believes and therefore alleges, at least five minutes; admits *that at 3:10 p. m. the 'Selja's' engines were stopped;* alleges that it is ignorant as to how long they had been stopped or as to their speed, if any, between 3:05 and 3:10 p. m., but in that behalf *alleges that at 3:10 p. m. the 'Selja' was almost at a standstill in the water.''*
>
> (I, 24-25.)

We have to confess our inability to explain how the ''Selja'' going *''at a high rate of speed''* was driven to a point where she *crossed the ''Beaver's'' course* and then stopped dead in the water. This allegation is abandoned in the answer in the freight suit, and it is there alleged ''that after the 'Selja' came to be stopped in the water, *if such was the fact,* the master failed to give a signal thereof'' (IV, 1468). This hardly shows much confidence in the suggested defense.

We submit, therefore, that it is absolutely clear that the ''Selja'' had not come to a standstill before sighting the ''Beaver'' and, even if the admissions in question were in fact made, they were wholly untrue in fact. And we again point out that a violation of the two whistle rule can only be established by discrediting in toto the evidence of the officers of the ''Selja'' that the engines were not stopped till 3:10 p. m. The very most that could possibly be urged by appellee is that there is a *doubt* as to whether the ''Selja'' had become dead in the water at *3:15* and, in view of the flagrant

and admitted fault of the "Beaver", the law clearly requires that this doubt be resolved in favor of the "Selja". We also submit that, as the "Beaver" failed to hear the *single blast* of the "Selja's" whistle until less than two minutes before the ships came in sight of each other, she would not have heard the two whistle blast any sooner, *and the failure to blow two whistles had absolutely nothing to do with the collision.*

The lower court made no findings as to any violation or non-violation of Rule 15, and it may be that appellee will not in this court adhere to its claim that said rule was violated, *in view of the absolute and manifest inconsistency of this position with the contention that there was a violation of Rule 16.* We, therefore, do not feel called upon to go into the subject further at this time. No findings having been made, the burden is upon the appellee to establish its case as to this alleged fault, and we have said as much as we have on the subject in order that it might not be said that we had entirely ignored it.

The Contention (Upheld by the Lower Court) That the "Selja" Violated the Stopping Requirement of Article 16, and That Such Violation Contributed to the Collision Despite the Fact That the "Selja" Was Moving Backwards at the Time. Major and Minor Fault Principle.

We now come to the really vital questions presented by this appeal. That the "Selja" did not stop her engines on hearing the "Beaver's" first whistle is ad-

mitted, and it is also admitted that she did not stop them on hearing any of the subsequent whistles until 3:10 p. m., *about six minutes before the collision and while the vessels were still about two miles apart.* It is also undisputed, however, that, despite these admissions, the "Selja" was so navigated that, before colliding with the "Beaver", she had not only become dead in the water but at the time of the collision *she was actually moving backward.* In view of these facts there are presented for determination two important questions, namely:

1st. *When the first and succeeding whistles of the "Beaver" (up to 3:10 p. m.) were heard, was the situation of the vessels such, with reference to danger of collision, as to make Rule 16 applicable?*

2nd. *Admitting either a real or technical violation of Rule 16 by the "Selja", was such violation a contributing cause of the collision? And herein of the major and minor fault principle.*

It seems to us so clear under the cases that the second question must be answered in the negative, we feel that we could well rest our case on that point alone. However, as we also contend that Rule 16 never became applicable to the "Selja", we will first take up that branch of the argument, reserving the main question for the last.

IV.

Rule 16 Was Not Applicable.

As the vessels were over 5½ miles apart when the "Beaver's" whistle was first heard, and about 2 miles

apart when the engines were stopped, and as the record makes it perfectly clear that the "Selja" was proceeding at a rate of speed at all of said times which could easily have been overcome so as to have avoided a collision had the approaching vessel been also proceeding at a moderate rate of speed; it is apparent that our distinguished opponents and the lower court disagree with us in our contention that the stopping requirement of Article 16 only becomes applicable where the vessels are within a zone involving *danger of collision.* If there is no danger of collision, as ascertained by the whistles of an approaching vessel, we contend that the rule is not applicable, nor does it become so until such danger exists.

The latter part of Article 16 reads as follows:

> "*A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.*"

It will be noted that the collision rules divide themselves into two general classes: First, those which lay down *general* duties which are *continuous* in their requirements, and, secondly, those which impose special obligations under special circumstances. Article 16 is an admirable illustration of a rule combining both of these classes. Its first provision applies continuously to all vessels navigating in all kinds of fogs, the condition of the weather raising and continuing the requirement imposed by the rule. The second provision applies to that *special circumstance* of danger that arises

through the known presence in the fog of another vessel whose position is unknown.

It will also be seen that in *every* rule requiring special affirmative action the existence of *"danger of collision"* is the only condition which raises the duty to act (see Articles 17, 18, 19 and 20), and the words in Article 16, *"until danger of collision is over"*, presuppose danger of collision at the time the engines are required to be stopped.

Bearing in mind the distinction between the general danger of navigating in a fog, covered by the requirement of the rule with reference to moderate speed, and the special danger arising through the known presence of another vessel, whose position is unknown, it is our contention that the duty to stop the engines only becomes imperative at the moment the necessity for precaution arises. This would seem to be the recognized principle governing all the collision rules, based on special circumstances of danger.

In the case of *United States Mail S. S. Co. v. Rumball,* 21 How. 384 (16 L. Ed. 144), decided in 1858, one of the headnotes reads:

> "Those engaged in navigating vessels upon the seas are bound to observe the nautical rules in the management of their vessels on approaching a point where there is *danger of collision."*

In the body of the opinion the court said:

> "Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other *from the time the necessity for precaution begins,* and continue to be applicable as the vessels advance, so long as the means and oppor-

> tunity to avoid the danger remain. They * * * *are equally inapplicable to vessels of every description while they are yet so far distant from each other that measures of precaution have not become necessary to avoid a collision.''*

In *The Nichols,* 7 Wall. 664 (19 L. Ed. 159, 1869) the principle is re-stated:

> ''Where vessels approaching are yet so far distant from each other, or where the lines of approach though parallel are so far apart as not to involve risk of collision, that rule of navigation has no application to the case.
>
> * * * * * * * *
>
> ''Rules of navigation are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain.''

In *Peters v. The Dexter,* 23 Wall. 69 (23 L. Ed. 84), the court said:

> ''They (the rules) * * * are equally inapplicable to vessels of every description while they are yet so far distant from each other that measures of precaution have not become necessary to avoid a collision.''

In *Belden v. Chase,* 150 U. S. 674 (37 L. Ed. 1218, at page 1227) the court, in referring to the rules, again re-states the principle:

> ''They are not mere prudential regulations but binding enactments obligatory *from the time that the necessity for precaution begins,* and continuing so long as the means and opportunity to avoid the danger remains. Peters v. The Dexter, 23 Wall. 69.''

See also

Fraser v. The Wenona, 19 Wall. 41 (22 L. Ed. 52) 1874;

The Breakwater, 155 U. S. 252 (39 L. Ed. 139, 143) 1894;

The John King, 49 Fed. 469, 473 (C. C. A.) 1891.

The same principle has been laid down in England. In the case of *The Banshee,* VI Asp. 221 (Court of Appeal, 1887), Lord Esher said:

> "Now at what period of time is it that the regulations begin to apply to two ships? It cannot be said that they are applicable however far off the ships may be. *Nobody could seriously contend that, if two ships are six miles apart, the Regulations for Preventing Collisions are applicable to them.* They only apply at a time when, if either of them does anything contrary to the Regulations, it will cause danger of collision. *None of the Regulations apply unless that period of time has arrived.* It follows that anything done before the time arrives at which the Regulations apply is immaterial, because anything done before that time cannot produce *risk of collision* within the meaning of the Regulations."

In line with these cases are also the views expressed at the International Marine Conference when Article 16 was under discussion. Admiral Sampson there said that it should be made necessary to stop "if two ships are approaching *and in danger of collision*" (Vol. I, Protocol of Proceedings, p. 454). And it will be noted that it was the consensus of opinion at the conference that upon hearing the first whistle the vessels would be in close proximity to each other and about two miles apart, which would leave ample time to avoid the collision (Id. Sampson, p. 454; Goodrich, p. 457; Shack-

ford, p. 459). And in a statement by Mr. Goodrich (p. 458) it is assumed that there will be an interval of about six minutes before the vessels meet. *That* was the interval in this case after the "Selja" stopped her engines at 3:10, *although the "Beaver" was covering her share of such interval going at full speed.* We submit that here is strong corroborative evidence tending to show that Rule 16 did not apply to the "Selja" under the circumstances of the case at bar. Captain Kidston of the "Beaver" seems to take the same view (III, 886-7; 894); as also does second officer Ettershank (II, 540-541).

The concluding phrase of Article 16, *"until danger of collision is over",* clearly indicates the soundness of our contention, for it presupposes danger of collision at the time the duty to stop arises. And if the position of the other vessel is *"ascertained"* to the extent of involving no danger of collision *"until the situation changed"* (*The El Monte,* cited infra), the duty to stop is not applicable. If that other vessel is found to be so far distant as to involve no danger of collision, the reason of the rule fails, as does the rule itself. Of course, the question of the applicability of the rule is not to be concluded by the mere statement of the master, for every master in such event would be able to excuse himself by testifying that the hearing of the whistle showed no danger of collision. The vital question is whether the master *ascertained* from the whistle that no danger of collision was involved and *ascertained that fact correctly.* If his judgment later turned out to be incorrect, he could obviously not excuse himself, but if his judgment was in

fact correct and there was in fact no danger of collision, and he subsequently stopped his engines while the vessels were yet about two miles in distance and six minutes in time apart, it would be absurd to blindly enforce against him an artificial rule passed with reference to avoiding danger of collision and nothing else.

In this case we contend that, *as a matter of law,* assuming that the moderate speed rule was not being violated, the vessels were so far apart when the "Selja" heard the whistle that the rule did not apply. It will be helpful, however, to determine whether Captain Lie is fact "*ascertained*" the position of the "Beaver" with reference to danger of collision, as he squarely testified (Lie, I, 164, 298-9). And it may also be here remarked that both the first and third officers of the "Selja" were consulted and agreed that the whistle was very far off (Id. 218). Captain Lie's affirmation on this point, as it seems to us, is to be tested by all the surrounding circumstances such as the state of the sea and weather, the existence or non-existence of local noises, the nature of the sound, the means at hand for comparison with other known and located sounds, the speed of his vessel, etc., and also by facts subsequently revealed, such as the subsequent whistles and the distance *actually* separating the two vessels when the first and subsequent whistles were heard.

(1) *State of sea and weather.*

There was admittedly a westerly swell but no wind or sea (see Kidston, III, 870) and the fog was dense. Clearly the absence of wind and sea were favorable con-

ditions, and there is no evidence that the swell was an unfavorable one. As to the fog, we submit that by the better authorities it too is to be regarded as favorable for the *transmission* of sound. Professor Tyndall in his work on "Sound", after most careful and elaborate experiments, states that "*a homogeneous air is the usual associate of fog, and hence the acoustic clearness of foggy weather*" (p. 335).

At the International Marine Conference Captain Shackford, *in expressing his opinion, based on experience, that a whistle can be heard in a fog farther than in clear weather,* asked for the opinion of the others. In reply the delegate from Great Britain, Admiral Bowden-Smith, said:

> "Mr. President, in answer to the delegate from the United States, I would like to say that *I agree with him,* and that in my opinion, and I have very often heard it, *the sound of a steam-whistle can be heard at a greater distance in a fog than it can in clear weather.* I would like to add one more remark on the difficulties experienced by the delegate from Norway in *locating* sounds. I know that this difficulty is made a great deal of among sailors, but I have not found that difficulty in locating sound in a fog. I have served a great deal in fleets, in my younger days; and, as you know very well, the ships often get scattered, and all that sort of thing. I would hear the whistle of the vessel in the fog, and when the fog lifted she would be where I supposed she was. I can say, for myself, that I do not find that great difficulty in locating sound in a fog which some people seem to find" (p. 459).

(2) *Non-Existence of Local Noises.*

The evidence of Captain Lie shows that there were no local noises (I, 162). The speed of the ship at six knots

gave no vibrations that could be heard or felt on the bridge (Id.). In fact the situation was so placid that the captain said he could hear the noise made by the seagulls as they rose from the water alongside the ship (Id. 171). Furthermore, it would seem from the testimony of Second Officer Larsen that the "Beaver's" first whistle was heard by him while he was *on the poop taking soundings,* and he heard not only the first but every succeeding whistle up to the time of the collision. For all practical purposes, therefore, the upper parts of the vessel were as free from local noises as though she were dead in the water, and this circumstance, together with the condition of sea and weather, made the situation ideal for hearing and locating sound.

(3) *The Nature of the Sound.*

Captain Lie on the "Selja's" bridge described the first sound heard as deep, faint and far away (I, 162). There was no mistaking its bearing as being practically right ahead, or its distance as being far off. In fact, it sounded so distant and faint that, for the moment, the fog siren at Bonita Point came to the master's mind,—Bonita Point was then known to be over twenty-five miles away,—and while, perhaps, this was not a very serious thought, still it led the master, upon hearing the second or third whistle, to time the intervals between those that followed. The first whistle was heard to blow during a space of time that did not materially differ from the duration of the succeeding whistles, and if, as matter of fact, it blew for a period of five seconds, then Captain Lie, under the most favorable conditions, heard that first deep, faint, sound for five seconds.

(4) *The Means of Comparison.*

The siren at Point Reyes was first heard by the "Selja" at about 2:30, when it was two and one-half miles away, and the very first whistle sounded loud and clear, showing that the "Selja" had just entered, from the northward, the sound zone of the whistle. This siren continued to be heard loud and clear every thirty-five seconds up to the time of the collision. Here then was the situation:

The "Selja" was and had been proceeding in the presence of a geographically fixed point, whose *bearing* and *distance,* at the time the "Beaver's" first whistle was heard a minute or two after 3 o'clock, were known with nearly the exactness that it would have been had it been visible. Hearing this land siren at 3 o'clock *loud and clear,* bearing due north a distance of 1⅞ *miles,* and immediately afterwards hearing the "Beaver's" first whistle for five seconds, *deep, faint and far away,* can it be doubted that Captain Lie, under such circumstances, could hardly have been better conditioned in passing sound judgment upon the distance of the "Beaver's" whistle being such *as not to involve danger of collision?* All of Captain Lie's prior and subsequent maneuvers during that fog show most careful navigation, and yet he says that thought of danger of collision never even suggested itself to his mind at the time of first hearing the "Beaver", and that had there been the slightest doubt as to her position, he would certainly have stopped the "Selja's" engine, *not that he might hear better* but because he would have been in doubt.

For the court's assistance in further testing the judgment of Captain Lie, it is entirely proper to consider the situation as affected by facts subsequently revealed.

(a) *The Distance Separating the Two Vessels.*

The first in importance of these is the question of the *actual* distance separating the two vessels at the time the first whistle was heard.

We have already, in discussing the subject of the "Beaver's" speed, said much that bears upon this point, and, if the court has adopted our contention that that vessel's speed was approximately 15 knots per hour, then it must be held that at 3 o'clock the two vessels were 4.83 knots, or 5.56 statute miles, apart (Lie, I, 192; Libelant's Ex. No. 1).

> "Nobody could seriously contend that, if two ships are six miles apart, the Regulations for Preventing Collisions are applicable to them".
>
> *The Banshee,* supra.
>
> (See also Kidston, III, 894.)

(b) *The Succeeding Whistles.*

Another matter proper for the court to consider would be the succeeding whistles of the "Beaver". These, as bearing upon the master's judgment of the first whistle, are of importance. It will be first noted that every succeeding whistle was heard, and at such exact intervals as to lead the "Selja's" master to almost immediately start timing the intervals to clear up his transitory thought about Bonita Point. Having definitely settled the question that the whistles came from a steamer, it

was also by the same operation of timing clearly made manifest that the *course* of the steamer was towards the "Selja" and, when this was ascertained, the engine was stopped, not because of the rule, but in obedience to good seamanship and cautious navigation (Lie, I, 170). And even then no thought of collision was present in Captain Lie's mind, for these succeeding whistles gave accuracy to his knowledge of the distance separating the vessels. His vessel had been proceeding at slow speed (3 knots) for five minutes, when his engine was first stopped, and he knew from the sound of the approaching whistles that there would be no difficulty in avoiding contact with the ship after she should be sighted. And as proof of his good judgment, the "Selja" is shown to have been almost at rest the moment the "Beaver" came in sight.

Some of the cases have applied Article 16 to vessels stopping their engines at the *second* whistle. This might seem to point to the strictness with which the rule is enforced, but we submit such cases rather show that in the circumstance of stopping at the second whistle is found clear proof of the applicability of the rule, for it is hopelessly contradictory to say that a *first* whistle reveals *certainty* of position, with reference to danger of collision, while the *second* reveals uncertainty. The ratio of certainty increases and does not decrease through hearing succeeding whistles. Succeeding whistles may well *verify* the master's judgment as to the position shown by the first, but, in such whistles refuting his judgment, there is found satisfactory evidence of the applicability of the rule.

In considering the meaning of the words *"not ascertained"* as used in Article 16, the court in *The Bernhard Hall* case (IX Asp. 300) said:

> " * * * it appears to me that the real object of the words was to negative the obligation to stop in case of repeated whistles. When whistle after whistle is heard the position is ascertained * * *."

Considering the "Selja's" then present environment and means of ascertainment, together with the subsequent *verifying* facts, we submit that the master's judgment that the rule did not apply should be upheld. And even if the testimony of Captain Lie and these facts are sufficient to raise a *doubt* as to the applicability of Article 16 at the times the whistles of the "Beaver" were heard, then, in view of the gross faults of the "Beaver" already set forth, that doubt should be resolved in favor of the "Selja".

In reversing the judgment of the District Court dividing damages between a tug and steamer, the Circuit Court of Appeals for the Fourth Circuit said:

> "The only fault charged against the tug is the failure to blow a passing signal, *as required by Rule 6*, when passing 'head and head', or when vessels pass within half a mile of each other. The master of the tug says he did not give the signal because he *did not consider the steamship to be within a half mile distance.*
>
> *If the testimony on this point is sufficient to raise a doubt as to whether Rule 6 was applicable, this will eliminate every possible ground upon which the tug could be held liable.*
>
> 'Where a fault is charged against one vessel in relation to which the testimony is doubtful, and there is undisputed testimony as to the fault of the

other, which is flagrant, the former vessel will not be charged with contributory negligence. The Manistee, 7 Biss. Fed. Cas. No. 9028'."

The Lord O'Neil, 66 Fed. 77.

The court, in the Manistee case, further said:

"A court will not find the other party in fault upon doubtful evidence when it can lay its hands upon a flagrant wrong and say that that, at any rate, was mainly the cause of the injury sustained."

We do not propose to go into the English cases construing Article 16 for the reason that such cases were decided with a view to another English statute, to be referred to under our next heading, which makes the decisions wholly inapplicable in the United States. We venture to remark, however, that none of the English cases, except possibly that of *The Brittania*, 10 Asp. 67, are, on their facts, inconsistent with the views herein expressed. All of the other cases, English and American, dealing with the latter part of Article 16, are, so far as we can find, cases where the alleged violation of the rule happened but a few moments before the collision, and in each case danger of collision was obviously imminent. None of them deal with a situation similar to that in the case at bar, to wit: where the first whistle was heard more than fifteen minutes before the collision while the vessels were nearly six miles apart. To say that the rule applies under such extreme circumstances, so obviously not meant to be covered, would be to put an intolerable burden upon navigation and to carry the matter to absurd limits. As to the case of *The Brittania,* we be-

lieve that it lays down a harsh doctrine which should not be followed, but the case itself can be readily distinguished in that the "Brittania" was clearly in fault *in resuming her speed in the face of danger of collision* and was moving ahead when the collision occurred.

We now proceed to a brief consideration of some of the American cases coming under the rule since it became legislatively effective in this country July 1st, 1897.

The El Monte, 114 Fed. 796 (D. C.), Adams, J.
(Decided March 4, 1902.)

Both vessels were held to have been going at an immoderate rate of speed up to within two or three minutes of the collision

> "in a frequented part of the ocean and in a fog of such density that they could not discover each other until they were within a distance of about five hundred feet."

Both also were held to have violated the second part of the rule in not stopping on hearing the first whistle, and the court in speaking of this part of the rule, said:

> "The object of this section of the article, providing an additional precaution against collision, was obviously to prevent vessels from approaching each other *closely* in a fog—*not, perhaps, requiring vessels to stop when so far away from each other that no danger actually existed, or could exist, until the situation changed,* but in all *doubtful cases* requiring an immediate stoppage of the vessel for the purpose of a better hearing, *to get the vessel's headway fully under command,* and to cause all on board to be on the alert to provide for contingencies."

Dunton v. Allan S. S. Co., 119 Fed. 590 (C. C. A.)
3rd Circuit. (Decided January 15, 1903.)

This was a collision during a thick fog between a schooner and a steamship. In the *lower court* the syllabus in part reads:

> "Each heard the fog signal of the other, and *the steamer at once slowed down to a moderate speed* and proceeded with caution * * *."

The *district judge,* in his opinion, said of the steamer:

> "She had already *slowed down* upon hearing *for the first time* the fog signal from the schooner, and this I think was her full duty. As the Supreme Court of the United States has said in the Ludvig Holberg, 157 U. S. 68, 15 Sup. Ct. 477, 39 L. Ed. 620, 'no case has ever held that a steamer was obliged to stop at the first signal heard by her *unless its proximity be such as to indicate immediate danger'*. Clearly there was no such indication in the present case, and the steamship was not in fault therefore in doing no more than *slowing down* to a moderate speed and thereafter *proceeding with caution.*"

Further on in the opinion the lower court uses this expression:

> "* * * and the steamship had *slowed her speed* at the first intimation of danger, and thereafter proceeded with due caution."

The District Court's judgment was affirmed by the Circuit Court of Appeals, where it is said (p. 592):

> "A careful review of the testimony convinces us that, on both vessels, the requisite care, under the circumstances, was taken to avoid accident, and that the collision was an unavoidable accident, for which no fault should be imputed to either vessel. In this, we agree with the opinion of the learned judge of the court below, when he says:

> 'The testimony satisfies me that, as soon as the vessels came in sight of each other, everything that was possible was done upon the steamship to avert the threatened disaster. *She had already slowed down upon hearing for the first time the fog signal from the schooner,* and this, I think, was her full duty. As the Supreme Court of the United States has said in The Holberg, 157 U. S. 68, 15 Sup. Ct. 480, 39 L. Ed. 620: "No case has ever held that a steamer was obliged to stop at the first signal heard by her, unless its proximity be such as to indicate immediate danger." Clearly there was no such indication in the present case, and the steamship was not at fault, therefore, in doing no more than slowing down to a moderate speed, and thereafter proceeding with caution. * * * Neither vessel, I think, was moving through the fog at a negligent rate of speed. The schooner's sails were all drawing, but the wind was so light that, as I have already said, she was not moving faster than two knots an hour, which gave her little more than steerage way; and the steamship had *slowed her speed* at the first intimation of danger, and thereafter proceeded with due caution.' "

Judge Hough in the case of *The Georgic,* to be referred to later, says that he sees nothing in *Dunton v. Allan S. S. Co.* opposed to *his* construction of Article 16,

> "for in that case it plainly appears that the engines of the steamship were *'stopped immediately'* upon hearing the first sound signal of the vessel with which she afterwards came in collision."

The warrant for this erroneous statement of Judge Hough's is to be found in the Circuit Court of Appeals' opinion in the Dunton case at page 591, where, referring to the *testimony* of the officers of the steamer, it is said:

> "Their testimony is * * * that the first signal which was one of two blasts heard from the schooner

> was just *a few seconds* before she loomed in sight through the fog; that immediately upon hearing these whistles a signal was given to the engineer to stop * * *."

It will be noted that this statement found in the Dunton case is not a statement of the court's finding, but merely a statement of what some of the witnesses testified to. The finding was as has been shown by the District Court decision, and this finding was affirmed by the Circuit Court of Appeals. Furthermore, the headnote of the Dunton case in the Circuit Court of Appeals, reads:

> "On hearing the fog signal of the schooner the steamer, which was then quite close, at *once slowed down* and proceeded with caution * * *."

From the foregoing it will be seen that there is no basis for Judge Hough's statement.

> *The Belgian King,* 125 Fed. 869 (C. C. A. 9th Circuit). (Decided October 19, 1903.)

This case, recognizing the *limitation* in Article 16 on the duty to stop, decided by this court, will be discussed at a later point in our brief.

> *The Commonwealth,* 174 Fed. 694, Adams, J. (Decided July 15, 1910.)

This case also recognizing the *limitation* in Article 16, on the duty to stop, we will refer to later under the next heading.

> *The Georgic,* 180 Fed. 863, Hough, J. (Decided May 31, 1910.)

This is a case in which the stopping requirement of Article 16 is strictly construed and enforced. The

Finance was held at fault for being on the wrong side of the channel, and both vessels at fault for disregarding the latter part of Article 16. Both vessels were in charge of licensed pilots, and, after reviewing their respective statements, the court said:

> *"It is thus positively asserted by both pilots that each distinctly heard forward of his beam the fog signal of a vessel, the position of which was not ascertained."*

The court says of the statement made by the Supreme Court in *The Ludvig Holberg* case as to the lack of necessity of a vessel to stop on hearing the first whistle: "Undoubtedly that was the rule under the International Regulations of March 3, 1885, *Article 13.*" This, we submit, is faulty criticism for Article 13 referred to was the moderate speed rule and had nothing to do with the question. It was *Article 18* of those rules that applied to the duty to stop (*The Umbria,* 166 U. S. 404; 41 L. Ed. 1053; *The Grenadier,* 74 Fed. 975). Again, the court says that Article 16 of the present rules, in decisions binding on it, has been construed as it construes it with reference to the duty to stop on hearing the first whistle, but we fail to find any such decision cited by the court. Its reference to *The St. Louis* (to be referred to by us later) is not in point on this subject, for the sole question decided in that case was that the Delaware, *admittedly having violated Article 16*, had failed to show that such violation had not contributed to the collision, and the court said that on the authority of *The Umbria* case, if the Delaware had *succeeded* in showing that she was reversed and going backward at the time of the col-

lision, she would not have been held liable for having violated the rule. This unmistakable approval of *The Umbria* case by the Circuit Court of Appeals for the Second Circuit in construing Article 16 makes strongly for the contention that the rule of *The Ludvig Holberg,* criticized by Judge Hough, also found approval, for the court in *The Umbria* case went even farther than it did in *The Ludvig Holberg* case, for it said:

> "We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead";

while, in the former decision, we find added the qualifying expression: *"unless its proximity be such as to indicate immediate danger".*

The test recognized by our courts on the duty to stop laid down by Article 16 is not *the bare hearing of a first whistle,* as suggested by Judge Hough, but the hearing of one whose position is not ascertained, *with reference to its involving risk of collision.* This test, instead of destroying, supports the applicability of the rule of *The Ludvig Holberg.* Furthermore Judge Hough's reference to *Dunton v. Allan S. S. Co.* is, as we have shown, clearly incorrect as supporting a view that Article 16 calls imperatively for the stoppage of the engines on hearing the first whistle, *for the rule of the Ludvig Holberg case is expressly adopted in that case.* It would, therefore, seem that the Circuit Court of Appeals for both the Second and Third Circuits differ from the test as laid down by Judge Hough and some of the English cases which he seemed to follow.

The Minnesota, 189 Fed. 706. We believe that this case, the latest on the subject, is a strong one in our favor but it can be best dealt with under our next heading as to contributory negligence. We shall also deal under that heading with the case of *The Admiral Schley,* 142 Fed. 64, as well as with certain other cases of some applicability.

Taken all in all, we believe that the American cases not only do not conflict with the principle for which we contend, but that they lend very decided support to that principle. We submit that, if vessels are so far apart that no danger of collision exists, Article 16 does not apply. We also contend that if the master ascertains this fact, *and ascertains it correctly,* then the position of the vessel *is "ascertained"* within the meaning of the rule. And we finally submit that, if there is doubt as to whether the rule applied, that doubt, under the circumstances of this case, must be resolved in our favor. We believe that the foregoing discussion will be of assistance in the consideration of the last and most vital point in the case, to which we now turn.

V.

Even if There Is Found to Have Been Either a Real or Technical Violation of Article 16 by the "Selja" the Violation Was Not a Contributing Cause of the Collision. Major and Minor Fault Principle.

In considering this, the most vital phase of the case, the court should bear in mind the following facts:

1. *That the "Beaver", grossly in fault through the violation of several statutory rules, ran into and sank the "Selja".*

2. *That the "Selja" stopped her engines six minutes before the collision, while the vessels were still about two miles apart, and at the time of the collision was moving backwards.*

If these undisputed facts are clearly borne in mind we believe that the court will find it impossible to say that the "Selja" in any way contributed to the collision. In treating this subject we shall first endeavor to distinguish all of the English cases. We shall then discuss certain American cases, and apply them briefly to the case at bar. We shall then finally refer to and analyze fully a case recently decided by this court which we believe to be squarely in point and to be decisive in favor of the "Selja".

Following out the foregoing general arrangement, we first call the court's attention to *the reason* for a very clearly marked distinction between the American and English cases on the subject of contributory negligence and the correlative subject of burden of proof in collision cases.

An examination of the English decisions under Article 16 will disclose that in nearly every case a violation of the stopping provision of the rule has been held condemnatory of the offending vessel.

The Cathay, IX Asp. 35 (1899);
The Rondane, IX Asp. 106 (1900);
The Bernhard Hall, IX Asp. 300 (1902);

The Koning Wilhelm I, IX Asp. 425 (1903);
The Brittania, X Asp. 65 (1904).

The obvious reason for the marked distinction between the decisions of this country and England is to be found in the fact that in the latter country a statute expressly provides that:

> *"Where, in a case of collision, it is proved to the court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from this regulation necessary."*
>
> 57 and 58 Vict. C. 419 (4) (1894).

This statutory rule is cited by Marsden in his late work on Collisions (6th Ed.) in his second chapter entitled: *"Statutory Presumption of Fault"*. In it he goes into the similar regulations which preceded and led to the statute in question, including the regulation discussed in the case of *The Fannie M. Carvill,* L. R. 13 App. Cases 455, cited by our opponents in the lower court. It is submitted that these regulations are the cause for the adoption of the "but for" or *sine qua non* rule in England, as is made perfectly clear by Marsden's discussion of Rule 16. Thus, after citing the article in full, he says:

> "This article demands the careful attention of seamen, as a failure to stop the engines *under the circumstances mentioned will bring the vessel within the terms of 57 and 58 Vict. C. 419, and almost certainly cause her to be held in fault in case of collision."*
>
> Marsden, p. 372.

It is, therefore, a statutory rule which makes the "but for" rule applicable in England. There is no such statute in the United States and hence the "but for" rule does not apply here, except in such cases as *The Pennsylvania* (19 Wall. 125; 22 L. Ed. 148), where the violation of the rule was an actuality *"at the time of the collision"*.

Before 57 and 58 Vict. and the regulations preceding it went into effect, the English law was like our own, namely: that an anterior act of negligence by one party would not bar his full recovery if, notwithstanding his prior negligence, the other party could have avoided the collision. This is made clear by Marsden's first chapter. Thus on pp. 17 and 18 he says:

> "But it is clear that there is no difference between the rules of law and of admiralty as to what amounts to negligence causing collision; and that before a vessel can be held to be in fault for a collision, negligence causing or contributing to the collision must be proved. Thus, in Cayzer v. Carron Co., The Margaret, a vessel *infringed a statutory rule of navigation,* which required her to wait under a point in the river until the other ship passed, and was in this respect guilty of negligence; *and without that negligence,* other circumstances being the same, *the collision would not have happened;* yet it was held that this negligence *was not a cause of the collision.* * * * In The Margaret the one ship was held to be in fault, because with ordinary care she could have avoided a collision, notwithstanding the negligence of the other; and it was for this reason that the negligence of the latter was held not to be a cause of the collision. So in The Monte Rosa, a tug by her own fault steered a course which brought her into collision with the

> anchor of a steamship which the latter was, *contrary to the Thames rules,* carrying over her bows not stock awash, and was holed by the anchor. It was held that, since the tug could with ordinary care have kept clear of the steamship, she was *alone* in fault, and could recover nothing. The Lord Saumerez, an early case, is to the same effect. There a vessel recovered full damages, though *in a fog* she was carrying too great a press of sail and was proceeding at too great a rate of speed. The decision proceeded upon the same grounds—that the defendant could with ordinary care have avoided the collision, notwithstanding the negligence of the plaintiff."

Marsden then goes on to distinguish certain other cases and says on p. 19:

> "Many admiralty cases have been decided without sufficient consideration of the question whether the negligence found against each ship was negligence *contributing to the collision.*"

It will be noted that the English cases cited are cases of the violation of *statutory rules,* yet the vessel guilty of such violation was held *not to have contributed to the collision* and the "but for" rule was discarded. In the case of *The Fenham,* L. R., 3 C. P. 212, Lord Romilly gave utterance to expressions somewhat inconsistent with the cases in question, but Marsden clearly distinguishes that case.

Marsden, pp. 16, 18.

And in *Cayzer v. Carron Co.,* supra, 9 App. Cases, 873, 881-3, Lord Blackburne says:

> "Now upon that there must always be a question whether or not, if there is neglect shown of any rule, that neglect is the cause of the accident.

> Upon that the case of The Khedive has been referred to. In that case *the rule was by statute* and it was enacted positively that if the rule was not obeyed, the breach of it should in itself be deemed to be blame. *When the statute imposing the rule is short of that, it is necessary to see that the actual transgression has been the cause of the accident to some extent.* * * * I do not think that the judges of the Court of Appeal for a moment meant to say that the transgression of this rule was in itself sufficient *unless it was an occasion of the accident.* * * * The only case I am aware of which seems to point to there being any difference between the rules of Law and of Admiralty is the case of The Fenham, where there are expressions used by Lord Romilly, then Master of the Rolls, which seem to point to his having thought that the burthen should lie upon those who infringed a rule to show that the infringement was not the cause of the collision. Now I am not at all sure that with proper qualifications that would not be a fair enough rule when applied to such a thing as a collision at night when there was an absence of lights. But when you come to apply it to such a case as this and say that it is shown that the Clan Sinclair and the Clan Sinclair's people are blameable for this loss * * * because the Clan Sinclair *ought to have eased and waited sooner,* I do not think it follows, as a reasonable rule of evidence, to say that that occasioned the accident unless the Clan Sinclair can show that it did not occasion the accident."

In that case the Clan Sinclair violated a statutory rule and without that violation no collision would have occurred (see opinion, p. 883), yet she was held blameless.

It will thus be noted that *before* 57 and 58 Vict. and the statutes preceding it, creating a statutory presump-

tion of fault, the rule of the English Admiralty was the same as that of the common law on the subject of contributory negligence and the "but for" rule did not apply. And the leading English case of *Davies v. Mann,* 10 M. & W. 546, has been repeatedly referred to in admiralty on this subject (Marsden, pp. 16-20). In that celebrated case the plaintiff left a donkey unlawfully on the highway and defendant ran over it. Parke B. said:

> "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there. * * *"

We cite this language for the reason that it seems directly applicable to the case at bar, if we assume that the "Selja" did technically violate Rule 16.

Counsel in the lower court contended, however, that the English statutes in question do not lay down "any rule at all as to *liability* or *causation*" and that, although the statutes say that the vessel "shall be deemed in fault", they nowhere say that the fault will be deemed *"to have contributed to the collision",* and they there cited English cases showing that if the fault "could not by any possibility have contributed to the collision" the vessel would not be held liable, despite the statutes. This is the "but for" rule, however, and it is *because of these statutes* that that rule is laid down. This point is well illustrated by the case of *The Fannie M. Carvill,* L. R., 13 App. Cases 455. The actual decision in that case was that where a ship infringed Article 3 of the sailing regu-

lations by carrying her sidelights with screens shorter than the length prescribed thereby, and it was proved that such breach of the regulation could not possibly have contributed to the collision, she could not be held liable for damages. The case turned upon Section 17 of the Merchants Shipping Act of 1873 reading as follows:

> "If, in any case of collision, it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in, or made under, the Merchants Shipping Act, 1854 to 1873, have been infringed the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary."

It was contended that this statute made a ship violating the regulations liable, even though such violation did not contribute or could not possibly have contributed to the collision. *The court said that obviously under this statute mere proof that the infringement of the regulation did not in point of fact contribute to the collision was inadmissible, as the legislature intended to obviate the necessity for the determination of such question of fact upon conflicting evidence.* The court also said, however, that if it could be proved that the violation of the regulation could not, by any possibility, have contributed to the collision, as it was proved in the case in question, then the statute did not apply. In denying the contention that the vessel must be held liable in any event, the court said in part:

> "It would, in fact, make the vessel guilty of the infringement, a sort of outlaw of the seas, by de-

> priving her of the right to recover, under any circumstances, more than half the damages to which, by the general law maritime, she might become entitled."

It thus appears that this case is far from being an authority against the appellant and is a very forcible authority in his favor for the court holds that, *because of the statute in question,* the burden was thrown on the party violating the regulation to show that the violation could not *by any possibility* have contributed to the collision,—thus clearly implying that but for the statute it would be enough to show that the violation did not in fact contribute to the collision.

This case makes it clear beyond question that the English statutes in question *do* deal with the rule of *liability* or *causation* and bring into force the "but for" rule. And in the citations already made from *Marsden on Collisions,* it is clear that these statutes have been the real reason for the English decisions under Article XVI.

> Marsden, p. 372, quoted supra.

The difference made in the law by the English statutes is strikingly illustrated by the case of *The Brittania,* 34 Fed. 557, where a vessel violated a statute in being in the wrong part of a channel. On this subject Judge Brown said:

> "Neither of these statutes has any sanction annexed to it. It is *not* declared that any vessel going in the wrong part of the river shall be deemed in fault. * * * Aside from some special provisions making the non-observance of the statute in itself a ground of liability, as in the British Act above

> referred to (the Act of 1873 cited in the *Carvill* case), the mere transgression of such a statute will not make the vessel liable where the disobedience of it did not contribute to the collision. And in as much as *only proximate causes of collision are deemed material,* the mere fact that a vessel is on the wrong side of the river does not make her liable, if there was ample time and space for the vessels to avoid each other by the use of ordinary care."

It is true that the American cases following the rule of *The Pennsylvania* (supra) attach a presumption of fault to a vessel in violation of a statutory rule "*at the time of the collision*", but they go no farther than this, *and no case can be found under Article 16 where a vessel moving astern at the time of the collision was held liable.*

We submit that the statutes referred to clearly distinguish the English cases, in so far as they deal with the subject of contributory negligence, and it remains only to take up the American cases. In doing so it will be appropriate and consistent to consider jointly with this subject of contributory negligence the equally well known *major and minor fault principle,* so often applied in collision cases, many courts holding that where there is doubt as to the contributing character of a fault that doubt will be resolved against the vessel whose fault is shown to be flagrant and in itself sufficient to account for the collision.

As has been intimated, we are familiar with the rule laid down in the case of *The Pennsylvania,* 19 Wall. 125, 22 L. Ed. 148, and have no fault to find with it, but its

application, as we shall now show, does not reach the case at bar. If the time at which the alleged fault of the "Selja" was committed does not bear some reasonable connection with the time of the collision, or if the faults of the two vessels are out of all proportion to each other, then, we submit, the rule as to burden of proof laid down in *The Pennsylvania* does not apply. Judged from either of these tests, the rule does not reach the "Selja", for it is perfectly clear that at the time of the collision in this case, and for six minutes before it, the Norwegian boat was not in the actual violation of a statutory rule intended to prevent collisions. The time of the "Selja's" non-compliance with Article 16 is confessedly fixed as at periods long before the collision, and under such circumstances, as the faults of the "Beaver" were flagrant and sufficient to account for the collision, and as the "Selja's" failure to stop her engine at such times bears so small a proportion to such faults, then, we submit, the burden of proof is upon the appellee to show that the "Selja's" alleged prior error had some probable connection with the immediate acts of the "Beaver" that produced the injury. Furthermore, we submit that where one fault is gross and the other slight, the latter bears so little proportion to the former that it would seem but fair that the more pronounced offender should have the burden of showing that the prima facie discrepancy in the faults does not represent the real situation. We shall now cite some of the cases bearing on these points:

In *The Lord O'Neil,* 66 Fed. 77 (C. C. A. 4th Circuit, 1895), the court said:

"The only fault charged against the tug is the failure to blow a passing signal, as required by Rule 6, when passing 'head and head', or when vessels pass within half a mile of each other. The master of the tug says he did not give the signal because *he did not consider the steamship to be within a half mile distance.* * * *

If the testimony on this point is sufficient to raise a *doubt* as to whether Rule 6 *was applicable,* this will eliminate every possible ground upon which the tug could be held liable. 'Where a fault is charged against one vessel in relation to which the testimony is doubtful, *and there is undisputed testimony as to the fault of the other, which is flagrant;* the former vessel will not be charged with contributory negligence. *The Manistee,* 7 Biss. Fed. Cas. No. 9028.'

But we will not let our position rest upon so narrow a margin. If it be true, as found by the District judge, that the steamship was 'grossly in fault', and if it be true, as we find, that the immediate cause of the injury was the inexplicable and culpable change of course by the steamship after she came abreast of the tug, the omission to blow the passing signal bears so little proportion to the flagrant faults of the steamship and contributes so little to the disaster, that it is not entitled to consideration.

The proximate cause of the injury is the first and main question to be determined in fixing and apportioning the liability, and finding, as we do, that the immediate cause of the collision was the change of course after the tug was passed, the misconduct of the steamship is not alleviated by proof of some omission to do an act which *had no direct connection with such misconduct. Where fault is clearly shown on one side* full proof should be required to shield from liability the party guilty of such fault, and it should appear that the alleged contributory negligence had, or probably might have had, something to do with *the act which produced the injury.*"

This view of slight fault is taken by the Supreme Court in many cases, as, for instance, in the case of *The Grace Girdler,* 7 Wall. 196 (19 L. Ed. 113), where the court said:

> "If there was an omission under the circumstances it was an error and not a fault. In the eyes of the law the former does not rise to the grade of the latter and is always venial."

In *Ralston v. The State Rights,* Fed. Case No. 11,540, the court, in speaking on this subject of mutual fault, said:

> "It is contended that, where both parties are in fault, the damages must be shared. Jac. Sea Laws 328. I presume the plain meaning of this is that they were both in fault *at the time, and in the acts which produced the injuries to both,* and not that one of the parties had, on a previous occasion, been in fault with the other. I should offer another modification to the generality of this rule in cases where the faults are egregiously unequal; for a slight fault on one side would not justify a destructive retaliation on the other, even *at the same time.*"

In *The Europe,* 175 Fed. 596, Wolverton, J., holds the Europe to have been in violation of several statutory rules with reference to her lights, but holds that none of them were shown to be contributing causes. The court said:

> "* * * a vessel in collision is presumed to be in fault *if at the time* it was acting in violation of statutory rule intended to prevent the occurrence. The presumption, however, is a disputable one which should be, and is, overcome by competent proof that such unlawful action could not have been the cause of the collision."

In recently affirming this decision this court said:

> "A harmless fault, *even when a positive mandate of a statute has been disobeyed,* cannot be made a basis for the recovery of damages in a civil suit, nor palliate the fault of another which does inflict an injury."
>
> Id., 190 Fed. 475, 481.

In *The Great Republic*, 23 Wall. 20 (23 L. Ed. 54) the court said:

> "The Cleona did not blow her whistle for each boat to keep to the right as soon as she started for the opposite shore. This omission was a fault, but this fault bears so little proportion to the many faults of the Republic, that we do not think that under the circumstances the Cleona should share the consequences of this collision with the Republic."

In the case of *The Athabasca,* 45 Fed. 651, it is said:

> "*It being established that the negligence of the libelant was the inducing cause of the collision and loss, the charge of accessory negligence on the part of the respondent as the foundation for compelling it to share the damages must be clearly made out.* In this the authorities all agree. The Comet, 9 Blatchf. 323; The Sunnyside, Brown, Adm. 247; Taylor v. Harwood, Taney, 444; the E. B. Ward, Jr., 20 Fed. 702; the Catherine, 2 Hawg. Adm. 145; The St. Paul, per Brown, J., E. Dist. Mich. not reported. The damages are not divided if the fault of one be slight, bearing but little proportion to the fault of the other. The Great Republic, 23 Wall. 20."

See also

> *Pierce v. J. R. P. Moore,* 45 Fed. 267;
>
> *The Clarion,* 27 Fed. 128.

In the case of *The Victory,* 168 U. S. 410 (42 L. Ed. 519) the head note reads:

> "*Where a vessel is clearly in fault for a collision* the evidence, to establish the fault of the other vessel, must be clear and convincing in order to make a case for apportionment of damages.
>
> "The burden of proof is upon each vessel in case of collision to establish fault on the part of the other."

In *Alexandre v. Machan* ("The City of New York"), 147 U. S. 72 (37 L. Ed. 84), it is said:

> "*In view of the recklessness with which the steamer had navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing.* Where fault on the part of one vessel *is established* by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to this claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

This rule laid down by the Supreme Court in *The City of New York* has been expressly *cited and followed* by the Circuit Court of Appeals for the *Second and Sixth Circuits* in numerous cases, as for instance:

The Mexico, 84 Fed. 504, 505 (C. C. A. 2nd C.);

The Newburgh, 130 Fed. 321, 324 (C. C. A. 2nd C.);

The Australia, 120 Fed. 220, 224 (C. C. A. 6th C.);

Lake Erie Transp. Co. v. Gilchrist Transp. Co., 142 Fed. 89, 97 (C. C. A. 6th C.).

In *The John H. Starin,* 122 Fed. 236 (C. C. A. 2nd Circuit), the schooner Gurney, anchored in the harbor

of New Haven on the night of October 18, 1900, was run into by the side wheel passenger steamer John H. Starin and sunk. In the suit brought against the Starin, she was charged with not keeping on the right hand side of the channel in violation of the statutory rule; with not keeping a proper lookout and with excessive speed. The Gurney was charged with not keeping a proper light as required by the rule for vessels at anchor. The lower court found for the libelant and held the Starin solely at fault. This judgment was reversed by the Circuit Court of Appeals, which held that the Gurney was at fault in not having a light and that the fault was the proximate cause of the collision. The court said:

> "Having thus found sufficient cause for the collision it is not necessary to pursue the discussion further. The Gurney's negligence having been clearly proved, it is necessary for her to establish the Starin's fault by proof of equal cogency. The City of New York, 147 U. S. 72, 85; 13 Sup. Ct. 211; 37 L. Ed. 84."

In *Long Island Ry. Co. v. Killien*, 67 Fed. 365 (C. C. A., 2nd C., 1895), we have another case of the actual violation of a rule. The court said:

> "Doubtless the Garden City was not being navigated as near as possible in the center of the river, *as the terms of the state statute, applicable to the East river required,* but this, as we have frequently had occasion to decide, should not condemn her for the consequences of a collision, which, notwithstanding her presence there, would not have occurred if the other vessel had exercised ordinary care to avoid it. Only such vessels can invoke the violation of the statute as an actionable fault *as have been prejudiced by it,* either because *their own movements have been embarrassed* by the presence of the

offending vessel, or because they have omitted to take some precaution in ignorance of her presence which they might otherwise have avoided danger by adopting."

Referring to what the master of the Garden City did, the court said:

"He deliberately chose a course which, in his judgment, at the time was sufficiently outside the tug's course to be a safe and prudent one. We think his judgment formed under such circumstances was not a rash one, or one which should be pronounced erroneous merely because subsequent events have shown that there would not have been a collision if he had pursued a course further to port. * * *

"There are circumstances under which one person ought to foresee and provide against the negligence of another; but ordinarily an act, though negligent, is not the proximate cause of an injury, when but for the intervening negligence of another the injury would not have been inflicted."

Long Island Ry. Co. v. Killien is cited with approval on this point in *The Lowell M. Palmer,* 142 Fed. 937 (C. C. A. 2nd Circuit).

In the following cases, also, vessels were held not liable *even though either state statutes or rules of navigation were violated:*

The Buckeye, 9 Fed. 667;
The Maryland, 19 Fed. 551, 556;
The E. A. Packer, 20 Fed. 327, 329;
The Clara & Reliance, 55 Fed. 1021, 1023;
The Obdam, 60 Fed. 637;
Wilhelmson v. Ludlow, 79 Fed. 979, 981.

In the recent case of *The Albatross,* 184 Fed. 363 (decided August 3rd, 1910), in asserting the rule of sole responsibility against a steamer, the court said:

> "Even though the steam tug was not navigated to the eastward as much as was possible to do, her failure did not contribute to the collision, as the Franklin was neither prejudiced nor embarrassed in her movements by any such omission."

The Ludvig Holberg, 157 U. S. 60 (39 L. Ed. 620). Decided March 4, 1895. This was a collision between a steamship and the tow of a tug occurring in the lower bay of New York. The steamer was charged with excessive speed as well as with a failure to stop and reverse on hearing the first fog signal of the tug. On the first point, as to the speed of the Holberg, the court said:

> "She was clearly not bound to stop solely on account of the fog, and if she had been running dead slow (which was 3½ knots as shown by the Circuit Court's findings) for four or five minutes before the collision, she cannot be held in fault for what her previous speed may have been."

On the next fault charged against the Holberg it was said:

> "No case has ever held that a steamer was obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger."

(This statement of the court should be compared with the statement made in *The Umbria* case two years later:

> "We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead.")

In *The Holberg* case the tug was held solely at fault for non-compliance with the rule which required her to

show that she had a vessel in tow, and in this connection it is said:

> "This is one of those cases where a clear fault has been found on the part of one of the vessels both by the district and circuit courts, and the findings of fact are such as to render it incumbent upon us to affirm their decree. As we said in Alexandre v. Machan, 147 U. S. 72, 85 (37: 83, 90): 'Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other essel should be resolved in its favor'."

Baltimore Steam Packet Co. v. Coastwise Transportation Co., 139 Fed. 777 (1905), affirmed 148 Fed. 837.

This case shows an excused violation of the provision that a steamer's speed must be moderate in a fog (Inland Rules).

The schooner Cramp was at anchor in a fog in Hampton Roads and was run into by the steamer Georgia. The schooner admittedly gave no fog signals, as required of an anchored vessel, while on the other hand, the steamer was charged with going at a high rate of speed. The court said:

> "The schooner Cramp insists that the collision did not come about because of her failure to give proper fog signals, but because the Georgia was proceeding at too high a rate of speed in the fog, in violation of the statutory provisions of the act of June 9, 1897, art. 15, 30 Stat. p. 99, c. 4 (U. S. Comp.

St. 1901, p. 2880). *This defense will not avail to relieve the Cramp, unless the same is clearly and conclusively established, since the Cramp has been found guilty of a palpable violation of the statutory requirement relative to navigation, sufficient within itself to account for the disaster,* and which, in the judgment of the court, caused the same; and it will not do, therefore, for her merely to throw doubt upon the conduct of the Georgia in order to escape liability herself. The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148; The Martello, 153 U. S. 64, 74, 14 Sup. Ct. 723, 38 L. Ed. 637; the Georgetown (D. C.) 135 Fed. 854, 857.

Neither do the facts in this case support the Cramp's contention that the speed of the Georgia entered into the cause of the disaster. While it is quite clear from the evidence that the Georgia *had been* violating the rules of navigation in respect to her speed, still *this condition did not prevail at the time of the collision.* It may be said to be providentially so, as far as the Georgia is concerned, but nevertheless it serves to relieve her from fault. The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620. It appears that shortly preceding the collision the navigators of the Georgia observed the lights of the schooner Elwell on her port bow, just in time, by stopping and reversing and swinging to starboard, to avoid a collision with her; and it was after this occurrence, and as the Georgia was swinging back to port to regain her course, and before any headway of consequence had been gained, that she collided with the Cramp on her starboard side, then lying immediately across her course. Had the Cramp given the proper fog signal, the collision with her would easily have been avoided after the Georgia had passed the Elwell and practically come to a standstill.

It follows from what has been said that this collision was caused solely by the fault of the schooner Henry W. Cramp, and a decree may be entered so determining."

In *The Ashbourne,* 181 Fed. 815 (C. C. A. 6th Circuit, 1910), the head note reads:

> "In a libel for collision the vessel guilty of primary fault is liable for the damages sustained, and clear proof of contributory fault by the other vessel must be presented before the latter can be held to bear equal share of the damages."

(This case sustains a decision of Adams, J.)

See also

The C. E. Paul, 175 Fed. 246, 250;
The Westhall, 153 Fed. 1010, 1016;
The William Chisholm, 153 Fed. 704, 713.

In *The Livingstone,* 113 Fed. 879, four distinct faults were charged against the Travers, namely: She displayed no red light; she displayed no range lights; she had no lookout; she did not stop and reverse. The Circuit Court of Appeals for the 2nd Circuit held that none of these facts contributed to the collision, and held to the rule that where the fault of one vessel is clearly established, and such fault in itself will account for the collision, it is not enough to raise a doubt as to the management of the other vessel. In this case the vessels were approaching each other at night, and the gross fault of the Livingstone was in putting her wheel hard-a-starboard without necessity therefor, which brought the vessels into collision.

The St. Louis, 98 Fed. 750 (C. C. A. 2nd Circuit) 1899. (Decided December 7, 1890.)

The decision of the lower court in this case does not seem to be reported. The suit was brought by the

Delaware against the St. Louis. The Delaware *admittedly disobeyed* the second part of Article 16; in other words, *the rule was applicable,* but the point before the Circuit Court of Appeals was whether the Delaware had met the burden of showing that her failure to stop her engines *was not a contributing cause to the collision.*

The District Court gave judgment against the St. Louis on the ground that she was at fault in violating the *first* part of the rule as to speed, and held that the Delaware *had* met the burden of showing that her failure to observe the *second* part of the rule did not contribute to the collision. The conclusions of the lower court as to the speed of the St. Louis, and the non-contributory character of the Delaware's fault, rested upon the testimony of one witness.

The Circuit Court of Appeals reversed this judgment, and ordered the libel dismissed on the ground that the libelant *had not* met the burden of showing that her violation of the latter part of Article 16 was not a contributing cause to the collision.

The witness relied on by the District Court testified as follows:

> "She (the Delaware) must have lost her headway and gone the other way, because I could feel the jar of the backward motion" (p. 751).

The Circuit Court of Appeals, in refusing to credit the evidence of this witness as to the speed of the St. Louis or the backward movement of the Delaware, said:

> "He (the witness) assumed that the vibratory motion of the Delaware, incidental to the reversal of her engine, was caused by the backward motion

of the vessel; and, assuming this, no doubt believed that the St. Louis was coming ahead sufficiently fast to run down the Delaware when she was retreating.

* * * * * * *

Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the St. Louis was not going at a moderate rate of speed, it cannot be held that the fault of the Delaware (in violating the rule as to stopping) *was contributory to the collision.* The Umbria, 166 U. S. 404-425, 17 Sup. Ct. 404, 41 L. Ed. 1053."

See also

The Saratoga, 180 Fed. 620, 623, 624;

The North Star, 108 Fed. 436, 445.

The Umbria, 166 U. S. 404 (41 L. Ed. 1053). (Decided April 5th, 1897.)

In considering this, the leading collision case on the question of contributory negligence, it is interesting to know that, although the regulation was not *legislatively* effective at the time, *the Circuit Court of Appeals based its decision on Article 16,* as it was *subsequently* adopted, *as a rule which but formulated a duty that the courts had often declared obligatory on the ground of prudent seamanship.* The Circuit Court of Appeals for the Second Circuit said:

"Prudent seamanship requires a steam vessel navigating in a fog, hearing apparently forward of her beam the fog signal of another vessel, the position of which is not ascertained, if the circumstances of the case admit, to stop her engines, and then navigate with caution, until danger of collision is over. This rule of conduct was approved by the international marine conference of 1888, as appears by ar-

> ticle 18 of the proposed regulations. *That article merely formulates the duty which nautical experience had found it necessary to observe, and which the courts had often declared obligatory.''*
>
> (53 Fed. 291.)

Throughout counsel's argument in the lower court it was insisted that, at the time of the decision in *The Umbria* case, there existed no fog rule directing the action of vessels after hearing a fog signal ahead, and that Rule 18 merely dictated the duty of a master to do certain things, if necessary, in all cases involving risk of collision.

In this counsel would seem to be in error, for Article 18 of the Rules of 1885 had been construed time and again as applying to conditions of fog. It was so construed in *The Umbria,* and in *The Grenadier,* 74 Fed. 974, 975, it is said:

> ''The Eighteenth (Rule) also in terms contemplates that the vessels shall know their respective courses, and then be able to see the threatened danger. *In spirit, however, it is applicable to a case where the vessels are hidden from each other by fog, and the signals heard indicate possible danger.''*

Again, in the lower court counsel contended that a statutory rule had taken the place of the law of *The Umbria* which, before the rule was enacted, had declared the judicial idea of good navigation in a fog. This proposition we cannot accede to. The law of *The Umbria* case *is based on a statutory rule,* and both that rule and the one which has succeeded it enunciate, on the whole, nothing more than that which long experience had taught to be good seamanship.

At the International Marine Conference, Mr. Hall, delegate from Great Britain, in speaking of the proposed rule, said:

> *"This is only making the law, that which practical seamen have believed and acted upon as the most prudent course under the circumstances."*
>
> *Protocol of Proceedings,* Vol. I, pp. 454, 455.

To relieve the "Beaver" from the applicability of *The Umbria* decision, counsel below made an ingenious argument in an attempt to distinguish between the old Rule 18 and the new Rule 16. No such distinction, however, can properly be made, nor did the Supreme Court make any such. As we have pointed out, the Circuit Court of Appeals *expressly based its decision on the then unadopted rule* (Article 16), but, in the statement made by Justice Brown, it will be seen that the Supreme Court considered the position taken by the lower court to be in consonance with the *existing rule* (Article 18), for he states as one of the grounds on which the Iberia had been held at fault by the Circuit Court of Appeals: *"because she violated Article 18 of the International Regulations * * *"* (L. Ed. p. 1056). The circumstances were such that, had there been any reason for distinguishing the then existing from the proposed rule, it certainly would have been commented on. Neither the Circuit Court of Appeals nor the Supreme Court saw fit to remark any practical difference between the two on the general question of the duty to stop.

It was charged that the Iberia had changed her helm in ignorance of the exact position and course of the approaching Umbria. Of this she was acquitted by the

Supreme Court. She was also charged with fault for having failed to stop her engines when she first heard the fog whistle of the Umbria. On this last point the court said that the authorities generally hold that, if the fog be dense, *prudent navigation requires that she shall stop her engines* and drift ahead until the approaching steamer comes in sight, or her whistles indicate that the two vessels are well clear of each other. The court then said that the fog in this case was sometimes "so dense that vessels could not see each other more than one or two lengths off". We beg to cite at length from the decision which, up to the present time, has been followed by the courts as laying down the rule of contributory negligence in fog collision cases:

> "We certainly do not wish to be understood as holding that it is necessary for a steamer to stop the moment she hears a whistle ahead of her in a fog, though it be directly ahead. Under such circumstances she may proceed at a reduced rate of speed; but if the whistle be repeated two or three times, and appear to be drawing near, the authorities generally hold that, if the fog be dense, prudent navigation requires that she shall stop her engines and drift ahead, until the approaching steamer comes in sight, or her whistles indicate that the two vessels are well clear of each other.
>
> * * * * * * *
>
> "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until *the course* of each was definitely ascertained. In a lighter fog

it might authorize them to keep their engines in sufficient motion to preserve their steerageway.

* * * * * * *

"* * * the whole theory of the cases which hold it to be the duty of a steamer meeting another steamer in a fog, to stop or reverse, *is based upon the hypothesis that a collision may thereby be avoided;* and if the facts afterwards ascertained indicate that such maneuver, under the circumstances of a particular case, could not have subserved any useful purpose, the steamer ought not to be held in fault *for the nonobservance of the rule. These rules* are intended *solely* for *the prevention of collisions,* and if it be clearly apparent that the observance of a certain *rule* would not have prevented a collision in the particular case, *the nonobservance of such rule becomes immaterial.*"

After reviewing a number of American and English cases on the subject of the duty of vessels to stop in a fog on hearing the fog signal of an approaching vessel, attention is called to several distinguishing features in the English cases from the case at bar, and the court then said:

"In the English cases above cited, both vessels were proceeding at a rate of speed no greater than that of the Iberia, and both were held in fault for not stopping and reversing, because, if that had been done promptly, no collision would have occurred; but, if it turn out that the approaching vessel was proceeding at such a rate of speed that a collision could not possibly have been avoided by the other stopping and reversing, it cannot be said to have been a fault with respect to such approaching vessel, that she still continued to keep her engines in motion. In this case it is manifest that no precautions on the part of the Iberia would have been of the slightest avail, in view of the extraordinary speed

> of the Umbria. **It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test. The propriety of certain maneuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect.** If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect—in other words, that both shall stop before the point of intersection is reached; and *if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible.*''

Any attempt in the case at bar to avoid the application of this rule of *The Umbria* case must be futile, for it has been adopted by our courts from the time of its promulgation down to the present and its adoption here makes hopeless the appellee's case. It will doubtless be claimed that the Circuit Court of Appeals for the First Circuit failed to follow it in the case of *The Admiral Schley,* 131 Fed. 437; 142 Fed. 64. In that case the tug Mayer had a tow over 2,000 feet long and was ''loitering'' in the path of navigation. The whistle of the Admiral Schley was first heard, apparently, less than a mile away, and the collision took place less than a minute thereafter, while the Mayer and her tow were

proceeding ahead. We wish to call the court's attention to the following language in the opinion:

> "* * * inasmuch as the Mayer *ran her bow into the Schley* under such circumstances that it is clear that, if she had run a few feet less there would have been no collision, it is equally clear that if either vessel had obeyed the International Rules no injury would have resulted. It is true that it is sometimes difficult for a tug having a long tow to stop, but in this case the difficulty was of the Mayer's own making" (142 Fed. p. 67).

Note also what is said in the main decision as to *The Umbria* case:

> "However, it is impossible to concede that there is any analogy between a tug like the Charles F. Mayer, 'loitering' with her tow, and a steamer like the Iberia, which, at least, *was endeavoring to escape by some action on her part*" (131 Fed. p. 437).

Is it not clear that under the very reasoning of this case the "Selja" would have been absolved in the case at bar, when she had stopped her engines six minutes before the collision and was *moving astern* at the time of the collision?

The Schley case does, as counsel will doubtless contend, recognize the "but for" rule as laid down in *The Pennsylvania,* but it recognizes it as it was meant to be recognized, as applying to a vessel in fault "*at the time of the collision*". And the Mayer was in fault at that time because she had not checked her headway at that time.

It will be observed that in *The Georgic* case (supra) the court refers to the case of *The St. Louis* as a decision

binding upon it. Reference to *The St. Louis* case would show that the Circuit Court of Appeals clearly recognizes the rule as to contributory negligence laid down in *The Umbria* case, for it says:

> *"Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the St. Louis was not going at a moderate rate of speed, it cannot be held that the fault of the Delaware was contributory to the collision. The Umbria,* 166 U. S. 404-421; 17 Sup. Ct. 404; 41 L. Ed. 1053."

In connection with the rule of contributory negligence laid down in *The Umbria* case, the following statement of the Circuit Court of Appeals for the Second Circuit in *The Portia,* 64 Fed. 811, at p. 814, is significant:

> "An antecedent act of negligence is remote when, notwithstanding the other vessel, by the exercise of ordinary care, can avoid a collision; and if, notwithstanding the fault of the tugs, the Portia could have avoided the collision by obeying the rule which, under the circumstances was imperative, she alone must be condemned."

The Columbian, 100 Fed. 991 (C. C. A., 1st Circuit), decided April 12, 1900.

This was a collision between a steamer and a schooner occurring in a fog shortly before midnight on August 30, 1898.

After discussing the evidence in the case, the court concludes its decision as follows:

> "As we have already said, *the fault of the Columbian was not only flagrant, but, on this appeal, confessedly so.* (Speed of 9 or 10 knots.) While we have no occasion to state the presumption as to the whole case against a vessel confessedly in fault, or

shown to be by uncontradicted evidence, so extremely as it is stated in The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84, 85, yet we have no hesitation in adopting the modified form found in the Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053, as a practical rule which cannot be disregarded, and which may be justly applied in weighing proofs under the circumstances of the case at bar. There it was said that, 'so gross was the fault of the Umbria, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor'. Any theory brought forward by the Columbian, guilty as she was, of a flagrant error, with a view of excusing herself in any part, is subject to suspicion to such an extent that it cannot prevail to hold the schooner, so long as the other probabilities, in connection with the direct proofs, do not so preponderate as to satisfy the mind in her behalf. Since, for the reasons we have stated, we cannot satisfy ourselves that the propositions of the Columbian with reference to the alleged faults of the Doughty are correct, we must necessarily hold that they are not sustained."

The Commonwealth, 174 Fed. 694, Adams, J.
(Decided January 15, 1910.)

The Commonwealth was held at fault for excessive speed in a fog. The Volund was charged *inter alia:*

With not stopping as required by Article 16.

In discussing the evidence as to the violation of this rule, and coming to no conclusion on it, the court then proceeds:

"Nevertheless, even if the Volund was not following strictly the provisions of Article 16, I do not think that her remissness was such as to condemn her under the circumstances.

* * * * * * *

"Even, however, if her navigation was faulty, she should be exonerated under the authority of the Umbria, supra, in view of the gross fault of the Commonwealth.

* * * * * * *

"There is considerable legitimate criticism of the Volund's navigation, but in view of the gross fault of the Commonwealth in proceeding at such a rate of speed, I do not think, under the authorities, that the Volund's minor faults are clearly enough established to entitle the Commonwealth to an apportionment of the damages. The Victory, 168 U. S. 410; the Transfer No. 14, 127 Fed. 305, 306."

The Cascades, 178 Fed. 726, Wolverton, J. (Decided April 18, 1910. Affirmed by this court Oct. 2, 1911; 190 Fed. 729.)

This was a collision between meeting vessels, and both were held in fault for remaining at full speed until nearly the time of the collision, although each had heard the fog signals of the other. The concluding paragraph of Article 16, however, was not applied and it was expressly held that the duty of each vessel was to so navigate as to enable them to stop before coming into collision with another vessel after the latter could be seen, assuming that such other vessel observed the rule. This rule is explicitly stated twice,—on pages 731 and 732. The case of *The Umbria* is cited with approval and the following passages are quoted:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels

to come to a standstill, until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway.

* * * * * * *

"The propriety of certain maneuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible."

The John A. Hughes, 184 Fed. 308 (1911). Circuit Court of Appeals, Second Circuit, reversing Adams, J.

Tugs with tows were approaching each other in a dense fog at the eastern end of Long Island Sound on almost opposite courses going at a moderate rate of speed. Each was blowing appropriate fog signals. When at some distance apart, and neither seeing each other, one gave a helm signal which was answered by the other. Each acted on the signal, as did all the tows but one, and this latter, throwing her helm the opposite way from that called for by the signal, collided with one of the approaching tows, and brought suit against each of the tugs. The District Court held both tugs in fault for not stopping when whistles were heard ahead. The

Circuit Court of Appeals held that *if not stopping had contributed to the collision,* then, the decree of the District Court was right. After quoting Article 16 of the Inland Regulations, the court said:

> "By good luck or by good management, the tugs did ascertain their relative positions correctly, and agreed upon a course of navigation which would have carried them and their tows clear of each other but for the Powell's shear. If their tows had come into collision without the intervention of this independent cause, their failure to stop would have put them at fault. On the facts of the case we cannot agree that it contributed to the collision at all."

The Minnesota, 189 Fed. 706. Holt, J. (Decided February 28, 1911.)

This is the last reported case on the latter part of Article 16. The steamer Minnesota was held to have been unseaworthy at the commencement of her voyage for want of an efficient whistle, which fault, together with her failure to reverse at once when going at seven knots per hour on hearing the Sidra's signal ahead, rendered her solely liable for the collision. On the charge of contributory negligence the court said:

> "I can see no ground for criticising the navigation of the Sidra except upon the single point that after she had once stopped her engines on hearing the fog horn ahead, and they had remained stopped for a minute, she started ahead again."

After then citing the latter paragraph of Article 16, the court quotes from *The Umbria* case as follows:

> "The general concensus of opinion in this country is to the effect that a steamer is bound to use only

> such precautions as will enable her to stop in time to avoid a collision after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerage way."

This application of *The Umbria* case, in direct connection with the latter part of Article 16, is significant of the fact that the courts of today are still following that case on the question of contributory negligence. The court, after commenting briefly on the facts, closes its opinion with this judgment:

> "At all events, the fundamental faults of the Minnesota are so marked, and the question whether the Sidra was in fault in starting ahead after stopping for a minute is so doubtful, that the entire blame for the collision should be placed upon the Minnesota."

In the case of *The Ashbourne,* Judge Adams, whose opinion is found in the reported decision of the case in the Circuit Court of Appeals (181 Fed. 815, 818), said:

> "There has been a strong disposition manifested on the part of the courts recently to let the blame rest where it principally belongs."

At the most, the "Selja" was guilty of a technical violation of the rule at a period long anterior to the collision and at the moment of collision was actually retreating from the point where the course of the two vessels intersected. In fact, if the "Beaver" was swinging rapidly to starboard from her original course, with

the "Selja" retreating from the point of intersection of the courses, then the collision occurred in spite of the fact that the "Selja" was moving away from the place where, in the natural order of things, it would have occurred and the "Beaver" actually pursued her in her backward movement and ran her down. Under such circumstances, unless the appellee can show that the "Selja's" failure to stop her engine, on hearing the first and succeeding whistles, embarrassed the "Beaver" in her movements, it seems perfectly clear that under the authorities it cannot be said that the "Selja's" fault was a contributing cause to the collision.

We might also add that, after going over all the cases under Article XVI, *we have not found a single one in which a vessel, which was actually retreating at the time of the collision, has been held in fault.* Such a vessel, so retreating, while she may perhaps have been blameworthy in her previous movements, cannot be held, under any proper definitions of legal cause, to have contributed to the collision.

We respectfully submit that to sustain the decision of the lower court on the question of the contributing character of the "Selja's" fault would be to ignore principles governing collision cases of such well known character that they need no special references to substantiate them, as for instance, what becomes of this principle?

Where gross fault is admitted and other gross faults are established by uncontradicted evidence, and both the admitted and proven faults are the proximate cause and sufficient in themselves to account for the collision,

proof of a contributing fault on the part of another vessel must be clear and convincing, and is not sustained when it raises a doubt as to the fault of such other.

Or this:

Under the facts above stated as to the gross fault of one vessel, proof of a contributing fault on the part of the other cannot be established if such other vessel so maneuvers that she has come to a stop after sighting the former vessel, and *a fortiori,* if before the collision she is actually retreating from the point of intersection of the two courses.

Major and Minor Fault Doctrine.

We have already called attention to some of the cases recognizing this well known principle, and there remains but a word to say as to its appropriate application to the facts of this case. It is immaterial in what order these facts are reviewed in reaching a conclusion as to the comparative gravity of faults. Let us, therefore, take up those applicable to the case of the "Selja".

Although she is charged with a violation of the stopping requirement of Article 16, the record shows affirmatively that, at the time of the alleged violation, it was her master's judgment that the rule was not applicable because of the distance separating the two vessels. In addition there are found in the record circumstances and conditions tending to support Captain Lie's judgment on this point. Furthermore, his judgment finds further support in the subsequent whistles of the "Beaver", as well as in the actual

distance separating the two boats as finally ascertained. And lastly, it finds vindication in the fact that he had practically brought the "Selja" to a point where she was dead in the water at the time the "Beaver" came in sight, and at the time of the actual impact *had started her on a retreating movement.* Let us again re-state the maneuvers on the part of the "Selja" accomplishing the result last stated:

Some two or three minutes after the first whistle was heard, the "Selja's" engine was put at slow speed. Five minutes afterwards it was stopped and she drifted ahead under the momentum of her former slow speed for five minutes longer and until she had almost become dead in the water, when the "Beaver" loomed in sight and then she reversed her engine and commenced to move backward. Surely, under these circumstances, it is at least a doubtful question whether the master's affirmative evidence of the inapplicability of the rule's requirement should not be upheld, and this doubt increases in favor of upholding said judgment as we consider the conduct of the other ship. She proceeded at her full speed, in absolute indifference to the fog, up to the very "jaws of the collision". Her speed was such that it must have had some effect on the ability to hear other whistles, for of the "Selja's" she heard but the two given next prior to the collision, and the "Selja" had a good strong whistle. The warning given by the first of these whistles was completely ignored, except as it prompted the vessel's master to blindly *change the course of the vessel's speed;* the warning given by the second whistle was so alarming in

its proximity as to move the "Beaver's" master to change the vessel's course again and in the opposite direction from the last change, and to stop and reverse her engines at full speed almost instantly when the "Selja" loomed in sight, lying directly in the path of the last change, and on this course the "Beaver" followed up the retreating vessel and sank her.

The "Beaver's" violation of the moderate speed rule was admitted at the end of a long trial, her violation of the stopping requirement of Article 16 and the general prudential requirements of Article 29 were so clearly proven by her own uncontradicted evidence that they stand on the same footing with her admission. The situation then is that, as to the "Selja", the applicability of the stopping requirement of Article 16 is strongly contested; as to the "Beaver", she stands convicted of the violation of three of the rules, one by admission and two by uncontradicted testimony, all violations existing at the time of the collision and each in itself sufficient to account therefor.

We submit that under these facts it is useless to deny the applicability of the major and minor fault doctrine to this case.

VI.

The Case of the "Belgian King", 125 Fed. 869.

We have reserved our discussion of this case until this time because it is squarely in point as embodying the decision of this court on the non-applicability of

the stopping requirement of Article 16 to a vessel less favorably situated than was the "Selja".

The facts, as found by the court, in so far as they bear on Article 16, and the conclusions drawn therefrom, are sufficiently established by the following quotation from Judge Morrow's opinion:—

> "Article 16 of the act of August 19, 1890, as amended May 28, 1894 (U. S. Comp. St. 1901, p. 2868, see 28 Stat. 1250), prescribing regulations for preventing collisions at sea, provides as follows:
>
> " 'Every vessel shall, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> " 'A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.'
>
> "Did the vessels act in accordance with these regulations? There is evidence tending to show that the Belgian King had been going at a greater rate of speed than 'half speed' prior to the hearing of the fog whistle of the Tellus at 10:45 p. m. But accepting the testimony of the captain of the Belgian King that his vessel was proceeding on her course at half speed, or at the rate of 8½ knots per hour; that between 10:25 and 10:30 p. m. the fog had become dense and had 'shut in thick'; and accepting the testimony of the captain of the Tellus that at half past 10 o'clock his vessel also encountered the fog, and that the engines of his vessel were brought down to 'slow speed', or three knots per hour, which speed, the captain testified, was the lowest at which steerageway of the ship could be maintained; and that seven or eight minutes later, according to the engineer of the Tellus, the engine

was brought to a stop—we have this situation: From the time the dense fog set in at 10:30 p. m. until the Belgian King was made aware of the approach of the Tellus, at about 10:45 p. m., the Belgian King was going at 8½ knots per hour, and the Tellus at 3 knots per hour, the slowest rate consistent with the maintenance of steerageway; that this speed was maintained for 7 or 8 minutes, when the engine was stopped. It is evident from this statement of the testimony that the Belgian King was not during this time going at a moderate rate of speed, having careful regard for the existing circumstances and conditions. This is determined partly by the inference to be drawn from the fact that the Tellus, under the same conditions, reduced her speed to 3 knots per hour, and after 7 or 8 minutes stopped her engine, while the Belgian King maintained a speed of 8½ knots per hour; but it is also determined by the fact that, while the Tellus was being navigated at the moderate rate of speed required by law, the speed of the Belgian King was maintained at such a rate that she could not and did not stop in time to avoid a collision after the Tellus came in sight. *The rule is that a vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog.* The Colorado v. The H. P. Bridge, 91 U. S. 692, 702; 23 L. Ed. 379; The Nacoochee v. Moseley, 137 U. S. 330, 339; 11 Sup. Ct. 122; 34 L. Ed. 687. That the Tellus observed this rule, and that the Belgian King did not, is established by the testimony as to the rate of speed each vessel maintained prior to the collision, and the fact that, at the time of the collision, the Tellus had stopped, and the Belgian King had not; also, by the character of the wound inflicted upon the Tellus."

We would also point out that the Tellus heard the Belgian King's whistle at 10:32, whereas the Belgian

King did not hear the whistle of the Tellus until 10:45, or just before the collision. We would further point to the claim made by the Belgian King that she had "about come to a standstill" at the time of the collision, a claim also made by the "Beaver" in this case.

It will thus be seen that the cases are as nearly identical as it is possible for two cases to be. The position of the Belgian King was certainly no more "ascertained" than was the position of the "Beaver" in the case at bar. Yet it was held there that the Tellus was not at fault, because she was maintaining before the collision

> *"such rate of speed as would enable her to come to a standstill by reversing her engines at full speed before she could collide with a vessel which she could see through the fog".*

For the same reason the "Selja" should be exonerated in the case at bar.

But it was contended in the lower court that it was held that the Tellus *"had actually ascertained"* the position of the Belgian King and that, *therefore,* Rule 16 did not apply. If this be true, the same finding should be applied to the case at bar. But we submit the court *did not* so hold. What it did hold was that the position of the Belgian King was "sufficiently *ascertainable* by the Tellus to permit her to continue her course at slow speed" after hearing the first whistle, and we take this as meaning that the Belgian King was then so far away as to involve no danger of collision. But, whatever the court meant, it is clear that the *controlling reason* for exonerating the Tellus was that already re-

ferred to, and that controlling reason exactly coincides with the rule laid down in *The Umbria,* which is the law today as well as in the past on the rule of proximate cause. The fault of the Tellus, if fault there was, in not stopping her engines on hearing the Belgian King's first whistle, did not contribute to the collision and the court clearly so holds.

Counsel in the lower court further contended that the case in question was one of novel impression. It is perfectly clear, however, that at the time of the decision (October 19, 1903) the following cases, among others, had already been passed on: *The St. Louis; The El Monte; The Cathay; The Rondane; The Bernhard Hall* and *The Koning Willem.* We do not believe that the court overlooked these cases.

Furthermore, counsel then contended that the briefs on file in *The Belgian King* case did not refer to the cases above cited. This we admit, but the arguments found in those cases were placed strongly before the court. Mr. Andros for *The Belgian King* laid repeated emphasis on Article 16, insisting that it had changed the rule of *The Umbria* case; while Mr. Page, counsel for the Tellus, as strongly urged that the rule of *The Umbria* was still applicable despite Article 16. These contentions were the ones most vehemently pressed and the latter contention undoubtedly prevailed.

The brief of *The Belgian King* says in part:

> "What, under such circumstances, was the duty of the Tellus? This question is answered by Art. 16 of the Act of 1890. * * * From the sound of the fog whistles, the officers of the Tellus could not

> possibly have '*ascertained* the position of the Belgian King', could not possibly *know* whether the latter steamship was exactly straight ahead or a little on the port or starboard bow; nor, in the pleadings, is such knowledge claimed; all that is claimed is that, judging by the sound, the ship was *nearly* straight ahead. Indeed, had such knowledge been claimed, it would have been opposed not only by the decisions of the courts of admiralty of the United States and of England, but to the universal experience of seamen * * *'' (p. 25).

Mr. Andros then goes on to show the uncertainty of the direction of sound in a fog, citing among others the statement of Mr. Flood of Norway, also relied on by counsel below in this case. Referring, later on, to *The Umbria* case, Mr. Andros says:

> ''The Umbria, 166 U. S. 404, was largely relied upon in the District Court by counsel for the Tellus in defense of the maneuvers of that vessel'' (p. 33).

He proceeded to discuss the case's applicability and then used the identical argument presented by counsel in the lower court in the case at bar:

> ''But, in addition to these points, a conclusive reason why the failure of the Tellus to stop, and her change of course was a fault under the circumstances of this case, is this: That, when the Umbria collision happened, there was no regulation in force to the effect that a vessel, hearing a fog whistle ahead, should stop; whereas, since that decision, and before the collision of the case at bar, a regulation has become law which leaves a vessel no option under the circumstances, and which now leaves no room whatever for the discussion which occupied the Supreme Court in the Umbria case, namely, the regulation in Art. 16, Par. 2, that a steam vessel

> finding herself under the circumstances of the Tellus, 'shall * * * *stop her engines,* and *then* navigate with caution until danger of collision is over.' In the case of the Umbria the question before the court was: What does *prudent seamanship* require of a steam vessel navigating in a fog, in the absence of legislative enactment? Since that case was decided, Congress has settled that question by positive enactment, and the only question in the case at bar is: *Did* the Tellus '*stop her engines* and then navigate with caution'?'' (p. 38).

Further quotations might be made but the foregoing clearly show that the applicability of Article 16, and of *The Umbria* case, under that rule, were fully before the court, and that the decision was rendered with both in mind.

Let us now turn to the brief of the Tellus, the views of the learned author of which we here adopt as our own. In the summary of his contentions at the opening of the brief he lays repeated and deserved emphasis on the fact that, as the Tellus was at a standstill when struck, it was impossible to say that she contributed to the collision. The following argument, in exact line with our contentions here, is also significant:

> ''1. The Tellus at the time the two vessels began to approach each other *so as to involve risk of collision* (italics ours), and from that time up to the occurrence of the collision, used due caution and observed the statutory regulations.''
>
> (Brief of *The Tellus*, p. 4.)

Under this heading the brief later says:

> ''*The Tellus was stopped and at a standstill when the collision occurred.* This fact was distinctly found by the learned District Judge.
>
> ''*It is the controlling fact in the case*'' (p. 8).

Again the brief says under the same heading:

> "The one object of the law is to insure the ability of the two vessels to come to a standstill before collision. This the Tellus did. *The Belgian King did not do it*" (p. 13).

Later on it is said:

> "It is enough to say that the Belgian King was not being navigated in such a way as to enable her to stop in time to avoid collision after the approaching vessel came in sight, providing the latter was going at the moderate rate of speed required by law (citing the Umbria).
>
> "If the Belgian King had stopped as the Tellus did, there could have been no collision. If she had slowed twenty minutes before the collision, when the Tellus slowed, there could have been no collision.
>
> "The primary fault, that without which there could have been no collision, is thus found to be wholly on the part of the Belgian King" (pp. 20 and 21).

And, finally, counsel for *The Tellus* says:

> "The burthen of avoiding a collision is not cast upon one ship alone. That ship is relieved from censure and fault which so navigates that a collision will be avoided, provided the other ship is equally careful in her movements (The Umbria, ubi sup.)" (p. 32).

How can it be said, in view of these arguments, that all points now before the court under Article 16 were not before the court in *The Belgian King* case? It cannot be said it was a case of "novel impression". Article 16 was fully discussed and analyzed in both briefs and *The Tellus* sought and found an escape from it under *The Umbria* decision. We submit that the case is a con-

trolling one, that it is on all fours with the case at bar, and that it is decisive as against any contention of fault on the part of the "Selja".

VII.

The Decision of the District Court.

We cannot believe that this court will accord to the stopping requirement of Article 16 the harsh construction given it in this case by the lower court, nor do we believe that this court, in order to give effect to the rule and place the "Selja" on a plane of equality of faults with the "Beaver", will shut its eyes to long established principles which have governed in collision cases for more than half a century. The construction of the latter part of Article 16 given by the lower court ignores the principle of proximate cause and fails to recognize the principle that a vessel is not to be held as contributing to a collision, which so maneuvers that she is able to come to a dead stop in the water after sighting another vessel and before colliding with her. As was said by the Supreme Court:

> "We are not to shut our eyes and to accept blindly an artificial rule which is to determine in all cases whether the master is liable to the charge of negligence in causing any loss or damage which may happen."
>
> *The Farragut,* 10 Wall. 334 (19 L. Ed. 946).

And yet it would seem that this is precisely what was done by the trial court. It not only declared for a nullification of the express limitation found in the rule

itself [It said: *"It* (the rule) *was designed to take away from a vessel the right to proceed at all after hearing the first signal, without first stopping the engines"* etc. That the rule assumes, *"that the zone of danger of collision is reached when the whistle is heard and forbids the ship to enter such zone except after stopping its engines to ascertain the position of the on-coming ship"*], but to this hard, unnatural construction it refused to apply any of the recognized principles which should have been applied to a vessel maneuvered as was the "Selja". Instead, it improperly applied the "but for" rule of the case of *The Pennsylvania,* linking with it the test of proximate cause laid down by an English court, in direct conflict with the test laid down by our Supreme Court. In applying the rule of proximate cause under Article 16, Barnes, J., in the case of *The Brittania* (X Asp. 65), said:

> "If the Brittania had stopped her engines in the first instance, her progress would have been stopped and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."

In applying the same test in the case at bar the lower court said:

> "Indeed it is quite apparent that if she had observed the rule she would not have reached the point of collision at the time she did and the "Beaver" would have passed her."

As opposed to this test of the lower court on the subject, the Supreme Court in the case of *The Umbria* said:

> "Manifestly this is *not* the proper test. The propriety of certain maneuvers cannot be deter-

> mined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible."

It is quite true that if the "Selja" had stopped on hearing the "Beaver's" first whistle, the collision would not have happened. It is also equally true, however, that if the "Selja" had gone ahead at either full or half speed the collision would not have happened. This demonstrates the weakness of the test applied by the lower court and this demonstration is exactly what caused the United States Supreme Court to disregard such test in *The Umbria* case:

> "It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test."

We have already dealt fully enough with the cases cited by the court as upholding its construction of Article 16. It is worthy of comment, however, that, while the court relies on the case of *The St. Louis,* as

showing a violation of the rule, it fails to notice the limitation expressly placed on it by that decision:

> "Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the St. Louis was not going at a moderate rate of speed, it cannot be held that the fault of the Delaware was contributory to the collision."

In other words:

> "Of course the fault of the 'Selja' did not contribute to the collision in the case at bar."

As to the cases cited by the court to sustain its view that the "Selja" contributed to the collision, they are based upon the well known rule of *The Pennsylvania,* which is *expressly* limited in its application to vessels violating the rules "*at the time of the collision*".

The case of *The Ellis,* 152 Fed. 981, cited by the lower court, was a case of fault at the time of the collision, and the court in dealing with this fault expressly said:

> "The actual violation *at the time of the collision* of a statutory rule intended to prevent collisions is presumably a fault, and if not the sole cause of the collision, at least a contributory cause."

Almost identically the same words were used in the case of *Hawgood Tr. Co. v. Mesaba S. S. Co.,* 166 Fed. 697, and in the case of *The Dauntless,* 121 Fed. 420, Judge De Haven simply cites the exact language of *The Pennsylvania* case. Judge De Haven's view of Rule 16, however, is shown by the case of *The Belgian King,* 113 Fed. 525, 526, where the vital fact that the Tellus

had been able to come to a stop before the collision took place completely exonerated her. And it is also worth noting that, in the Belgian King case, the vessels were not on parallel but on crossing courses, as counsel may contend the "Beaver" and the "Selja" were in the case at bar (see 125 Fed. at p. 877).

The case of *The Admiral Schley* has been already sufficiently distinguished, and as for the case of *Davidson v. Am. Steel Barge Co.,* 120 Fed. 250, we believe that it will, when examined, support our contentions rather than those of the appellee.

And let us here say that by *"at the time of the collision",* it is simply meant that the violation of the rule must bear some direct relation in point of time to tne collision, since otherwise a violation *hours* before a collision would put a vessel in fault.

The real point is this: If a vessel violates a rule, and that violation can possibly be said to be not overcome at the time of the collision, then the rule of *The Pennsylvania* clearly applies. If, however, the violation *be overcome* before the collision, the rule does not apply. The underlying object of Article 16 was to bring vessels to a standstill before a collision could occur (see Protocol of Proceedings, pages 407-509). If that object is not attained, a vessel will be in fault at the time of the collision for her prior violation of the rule in question. If, however, the object *is* attained, that violation is not a fault existing at the time of the collision. In the case at bar the "Selja" had not only stopped,

but was moving backward at the time of the collision. Her alleged prior fault had, therefore, been overcome. There is no case holding the contrary, while the cases of *The Belgian King* and *The St. Louis* squarely sustain this contention.

We further submit that the lower court should have in some way distinguished the case of *The Belgian King,* a decision binding upon it. Yet the only reference to that case is in regard to an entirely different point, to wit: the possible excessive speed of the "Selja" up to 3:05 p. m., which fault, if there was any fault at all, is entirely excused under *all* the cases, where a vessel is so navigated as to be able to come to a stop after sighting an approaching vessel, which was done in this case (see *Balt. Steam Packet Co. v. Coastwise Tr. Co.,* 139 Fed. 77, and *The Ludvig Holberg,* 157 U. S. 60, heretofore cited). And this illustrates the very point we make, for, if a violation of the moderate speed rule can be overcome so as to excuse a vessel, why cannot also a violation of the latter part of the same rule be overcome? We know of no answer to this question. In neither case is the violation of the rule a violation *"at the time of the collision".*

We respectfully submit that the lower court erroneously held that Rule 16 was applicable at all, and we submit that it palpably erred in holding that the violation of said rule by the "Selja" contributed to the collision.

VIII.

Conclusion.

THE NAVIGATION AND DISCIPLINE ON THE TWO VESSELS.

The "Selja's" Navigation and Discipline.

We have cited but little of the evidence in the case because the court will undoubtedly read it all and, when it is read, we venture to believe that one cannot help but be struck with the marked difference between the navigation of the two vessels and the discipline maintained on each. The master of the Norwegian ship was continuously at his post on the bridge, soundings were faithfully taken, bearings of the Point Reyes siren were taken, the vessel's position was plotted on the chart, her speed was regulated from time to time as the circumstances called for, so that, when the collision came, she was actually backing, the steam pressure on her boilers was regulated so that it would not blow off and thereby affect the hearing of fog whistles. The discipline on the ship was perfect up to the very last moment. When collision was inevitable the "Selja's" chief engineer and his first assistant rushed down to their posts in the engine room with no thought except that that was their place when danger threatened, and they remained there until the "Selja" began to sink and until summoned by Captain Lie to save themselves. Search as one may there is not to be found a word to substantiate a charge of lack of discipline or faulty navigation.

The Circuit Court of Appeals for the First Circuit has made this statement, and its pertinence here is apparent:

> "In several cases we have also referred to the fact that the maintenance of good discipline aboard

> a vessel, and evident care in proceeding in difficult situations nearly to the time of a collision, justify a strong presumption that she was vigilant with reference to the immediate circumstances which brought on the catastrophe."
>
> *Ross v. Merchants & M. Transp. Co.,* 104 Fed. 302, 304.

See, also,

The Genevieve, 96 Fed. 859;

The Columbian, 100 Fed. 991, 997.

The "Beaver's" Navigation and Discipline.

Let us take a brief glance at the other vessel. Along a frequented path of commerce, at the very entrance to the largest port on the Pacific Coast, she was steaming in a dense fog at her *full speed.* Surely the situation could not have been more fraught with *continuous* peril, at any moment calling for the instant exercise of the coolest judgment, for, going at such speed, with *"the full power on the ship",* nothing but the sanest, most energetic maneuver would be of the slightest avail to avert an ever present disaster. The lives of the "Beaver's" passengers were absolutely dependent upon the constant vigilance, cool judgment and quick skill of Captain Kidston. Surely, under these extraordinary circumstances, *when a desperate chance was being taken,* the master's place was on the bridge of his ship. Yet, at the moments of greatest need, the evidence shows that he was not there: At 2:15 when his vessel passed her last point of departure; at 3 o'clock, the time, *he says,* the fog shut in thick; at the time the first whistle of another steamer was heard out of the fog on the port

bow and, finally, at the critical moment, a minute or so before the collision, when the "Selja's" first whistle was heard; at each and all of these times he was absent. More than this: Whistles were heard out of the fog, forward of the beam, not once or from a single steamer, but many times from several steamers, but these warnings of peril were passed unheeded. Captain Kidston heard these whistles *a mile off,* the lookout forward heard *them close by;* fishermen testify that they were almost run down by the "Beaver"; Duxbury whistle was heard by the master when off the bridge, but by no one else; the lookout heard no steamer whistle on the port side, the master did; the master was supposed to know that his ship's engine was working 77 revolutions, yet sent word to reduce to 76 (a farcical order, we submit, under the grim circumstances); the order was given to a quartermaster who did not deliver it for ten minutes; the quartermaster on the bridge, stationed there as a lookout during the fog, was withdrawn to be used as a messenger; the master, in disregard of the rule of law, changed his vessel's head before sighting the "Selja"; the officer in charge of the bridge, admittedly in ignorance of the position of the sound of the "Selja's" first whistle, failed to stop the ship's engine, or take any other precautionary step except to call the master to his place of duty on the bridge; the master understood the three whistle backing rule to apply to vessels that were not in sight of each other; the lookout forward (who should have heard the "Selja's" whistle long before he did hear it) had been drinking and fell into the water from one of the "Beaver's" boats (IV,

1218; II, 592); and lastly, with the frightful experience fresh in mind of having sent to the bottom of the sea a valuable ship and cargo, with the loss of two human lives, the master *took another chance* and returned in the fog to the port of San Francisco at *full speed* (Kidston, III, 921) and, on hearing the fog signal of the United States Revenue Cutter McCullough, forward his ship's beam, *failed again to stop his engine* (Id. 919). These are harsh arraignments, but are justified by the facts.

We submit that the gross faults of the "Beaver", both admitted and proven, were the proximate and sole cause of the collision, and that the decree appealed from should be set aside and appellant should have a decree awarding the full damages suffered by himself and the owner of the "Selja" together with interest and costs in addition to the decree which he already has in favor of his officers and crew.

Dated San Francisco,
February 11, 1914.*

Respectfully submitted,

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S. H. Derby,
Proctors for Appellant.

Note:—Recognizing the importance of this case, we have had this brief printed long before the time required under the rules, so as to give our distinguished opponents ample time to file their brief within the time allowed them by the rules.